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106, 2025

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A LESSON OF RESPONSIBILITY

The tragedy that took place at the University of Warsaw, the murder of our colleague by a student, has no precedent – neither in the history of the University itself nor in the broader context of Polish academic life after 1989. The emotions associated with it are not only understandable but also natural. It is important to take a closer look at its implications. If only to learn the right lessons so that we can respond more effectively and efficiently in the future.

A TEST FOR THE COMMUNITY

Let us start with the issues that have received poor media coverage, but which are particularly worth highlighting. The community of the University of Warsaw demonstrated its most valuable qualities: solidarity, empathy and responsibility. It showed that it constitutes a genuine community, acting spontaneously and naturally. Students organised support groups and information stands, the dean's and rector's authorities launched immediate support actions. Security, administrative and support staff helped to secure the buildings and calm the atmosphere, psychologists and therapists volunteered their support, often going beyond their formal duties.

Already in the first hours after the incident, special psychological on-call services were set up – both on-site and remote – available to all members of the community: students, doctoral students, academic and administrative staff, security and support staff. The Psychological Help Centre immediately expanded its working hours and additional professionals volunteered to provide crisis

intervention. The University's website and social media provided specific information about the course of events and the support available.

The Faculty of Law and Administration immediately organised psychological and counselling services for both students and staff. Open meetings with faculty authorities, group discussions and individual consultations were organized. Students came forward with questions, doubts and emotions that could not have been expressed in any other form than through conversation. These were very difficult conversations. But they were indispensable for everyone.

WHAT POWERS SHOULD THE UNIVERSITY SECURITY GUARDS HAVE?

Of course, a question arises – did the University security staff respond appropriately and does the University provide them with adequate capacity to intervene in cases of threats? To answer this question, it is necessary to outline the legal and factual situation.

The current model of security services at the University has limited effectiveness in situations of sudden, extreme threat. The University Guard – which is assumed to be non-police, civilian and non-confrontational – does not use direct coercive measures. Its employees are not armed, nor do they receive training in responding to life-threatening situations – those that include contact with an attacker armed with a dangerous tool, physical aggression or hostage situations.

Such a model had its justification. Over the years, it was a conscious choice based on the values that make up the University's identity: openness, accessibility, trust, an informal atmosphere. We did not want a university that resembled an airport or a courthouse – with gates, scanners, patrols with guns at the entrance. We wanted to preserve the spirit of academic freedom, in which the physical presence of security was symbolic rather than deterring.

WE WILL NOT AVOID THE NECESSARY CHANGES

However, today this model needs to be fundamentally revised. We simply have to accept that we live in a world that is not free of violence – including spaces that were meant to constitute a refuge from it. It is not about turning universities into paramilitary units. A university must not be a place that resembles closed institutions – neither symbolically nor practically. Nevertheless, we need a new security model that is both realistic and relevant to our times and the threats we face.

This model could include better institutionalised cooperation with the police and emergency services, rather than ad hoc cooperation. It may require the implementation of modern alarm systems, which will allow to notify the relevant services immediately. It can assume physical infrastructural changes – not to make the University a closed space, but to make it more responsive.

Equally importantly, members of the academic community – including students, staff and administrators – need to receive comprehensive training on how to respond to threats. We need to move away from the assumption that 'someone else will take care of it'. Each of us needs to know what to do.

Even the best-equipped and trained formation cannot keep us safe if we do not take care of the issue ourselves. There are appropriate emergency response procedures in place. It is necessary to disseminate them, practice them and embed them in the everyday reality of university life. Regular emergency response training, evacuation drills, emergency simulations are needed. The aim is not to create an atmosphere of anxiety, but to learn how to behave under stress. This is the norm across Europe today.

RECORDING THE EVENT – THE FACTS

One of the most disturbing and also most controversial issues surrounding the tragedy at the University of Warsaw was the recording of the event by witnesses. In the hours and days that followed, some of this material began to circulate in the public space, and the subject of videotaping – despite its complexity – was immediately inserted into a broader, often simplified narrative about 'social desensitisation', the 'crowd effect' or 'screen culture'.

Let us move on to an issue that has been widely reported and that has appalled the public – the issue of recordings from the scene of the drama. Truth must be separated from false rumours.

It is not true, as suggested in some media reports, that the drama was recorded by 'dozens' of people. From the information we have, it appears that several recordings were made – some of which were made when the students, locked in a lecture theatre in the immediate vicinity of the incident, were acting on the express instructions of the class instructor, who recommended to make documentation in case evidence needed to be secured. These materials were immediately handed over to the law enforcement authorities. The persons who made them were interviewed and their recordings were included in the case file. These were actions – perhaps instinctive, perhaps intuitive – but set in the dramatic context of a real threat and confinement in a building where panic spread.

A completely different issue – and in this case there is no room for relativism – is making these recordings available on the internet. The dissemination of material documenting human harm, suffering, death – without reflection on the consequences, without respect for elementary principles of ethics – is an extremely irresponsible action, constituting a gross violation of the dignity both of those directly affected by the tragedy and of all of us, as a community, which by definition should be based on empathy and mutual respect. A lecturer is no substitute for a doctor.

Among the many questions that have arisen in the wake of this tragedy, one is among the particularly difficult and painful ones: could this have been foreseen? Could someone – a course leader, a supervisor, a lecturer – have spotted something worrying earlier and reacted in time? For the sake of fairness and responsibility, we must definitely say: No!

An academic teacher is neither a clinical psychologist nor a psychiatrist nor a therapist. He or she has neither the competence nor the formal tools to do so. If a student does not show any obvious symptoms, which was the case here, i.e. does not behave aggressively, does not direct threats, does not reveal deep emotional disturbances, then the academic staff has no grounds to intervene. And even if there are signals such as withdrawal, excessive calmness or introversion – the reaction is to suggest contacting the University's Psychological Help Centre or a specialist in another form. Would we want an academic to replace a doctor or make decisions relating to a student's health? Not only would this go beyond his or her remit, it would also unduly interfere with the personal freedoms of the students.

The strength is in the community. Together we can act more effectively, countering verbal and physical aggression, but also responding appropriately to sudden, unforeseen threats. The unprecedented tragedy that occurred at the University should be a lesson for all of us – from students and academics to lawmakers. A lesson in great responsibility.

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DOMINION VOTING SYSTEMS V FOX NEWS NETWORK: DEFAMATION ACTIONS AS A TOOL FOR THE RULE OF LAW IN TURBULENT TIMES

Abstract

When we think about areas of law that are most essential to advancing the Rule of Law in turbulent times, constitutional law and its limits on the power of government might be the first thing that comes to mind. Injury or tort law is probably not at the top of the list. Yet the law of defamation, one type of tort law, arguably played a significant role in counteracting false statements about the 2020 Presidential Election in the United States, false statements that led to a violent assault on the U.S. Capitol.

Dominion Voting Systems, the manufacturer of electronic voting machines, sued Fox News for defamation based on statements asserting that Dominion rigged the election and committed election fraud. After a judge rejected several of Fox's main defenses raised in a summary judgment motion, Fox agreed to pay Dominion $787.5 million to settle the case. This Article explains the court's summary judgment decision. It concludes by arguing that controversial aspects of U.S. defamation law – such as the high bar of the actual malice standard and the trend against recognizing the privilege of neutral reportage – helped advance the Rule of Law in this case.

KEYWORDS

defamation, actual malice, neutral reportage, election fraud

SŁOWA KLUCZOWE

zniesławienie, typowa złośliwość, neutralny reportaż, oszustwo wyborcze

I. INTRODUCTION

One recent example of turbulent times in the United States is the controversy over the legitimacy of the 2020 Presidential Election. In November 2020, Donald Trump, the President of the United States, said repeatedly that the 2020 Presidential Election had been stolen from him due to fraud by, among others, Dominion Voting Systems, the manufacturer of electronic voting machines used in numerous states.[1] Over the next few months, two of his lawyers appeared repeatedly on Fox News television programs, asserting that Dominion committed election fraud by rigging the election and that Dominion's software and algorithms manipulated vote counts in the election.[2]

One example involves Trump's attorney Sidney Powell's appearance on Fox News with Host Maria Bartiromo on 8 November 2020. Powell stated, 'There has been a massive and coordinated effort to steal this election from We the People of the United States of America, to delegitimize and destroy votes for Donald Trump, to manufacture votes for Joe Biden. They used an algorithm to calculate the votes they would need to flip and they used computers to flip those votes from Trump to Biden'.[3] Bartiromo responded, 'Sidney, I want to ask you about these algorithms and the Dominion software. Sidney, we talked about the Dominion software. I know that there were voting irregularities. Tell me about that'.[4]

Dominion contended that these statements were untrue, supporting its contention with substantial evidence.[5] However, enough people believed that the election was stolen and as a result a 'Save America' rally in Washington DC on 6 January 2021 culminated in a violent assault on the United States Capitol by more than 2000 people.[6]

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[1] *U.S. Dominion, Inc. v Fox News Network, LLC*, 293 A.3d 1002, 1019 (Sup. Ct. Del. 2023).

[2] ibid 1022, 1065–1102.

[3] ibid 1065.

[4] ibid.

[5] ibid 1023–24.

[6] Jim Rutenberg and others, '77 Days: Trump's Campaign to Subvert the Election', *New York Times*, 31 January 2021, <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html; Ryan Lucas>, 'Where the Jan. 6 insurrection investigation stands, one year later', *NPR.org*, 6 January 2022, <https://www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice>.

In March 2021, Dominion sued Fox News Network and Fox Corporation for defamation in the Superior Court of Delaware, seeking $1.6 billion in damages.[7] Both Fox and Dominion filed motions for summary judgment, arguing that the judge could rule as a matter of law on some or all of the elements of defamation. On 31 March 2023, the judge denied Fox's motion and granted part of Dominion's motion, setting the stage for a jury trial on the remaining issues.[8] However, on 18 April 2023 – right before the trial was due to begin, and after a jury was selected – the parties settled, with Fox News agreeing to pay Dominion $787.5 million.[9] This is the largest publicly known defamation settlement in United States history.[10] The dollar amount is arguably a vindication of the Rule of Law and of the ability of the judicial system, at least sometimes, to determine what is true and what is false.[11]

II. DEFAMATION LAW IN THE UNITED STATES

Defamation law in the United States consists of two components: the elements developed by States through statute or common law in order to protect individuals' reputations and Constitutional requirements imposed by the United States Supreme Court in order to protect free speech. The former include (1) a false and defamatory statement, (2) of or concerning the plaintiff, (3) publication, and (4) special harm or defamation *per se*.[12] A statement is defamatory if it 'tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him'.[13] Statements

[7] Merrit Kennedy & Bill Chappell, 'Dominion Voting Systems Files $1.6 Billion Defamation Lawsuit Against Fox News', *NPR.com*, 26 March 2021, <https://www.npr.org/2021/03/26/981515184/dominion-voting-systems-files-1-6-billion-defamation-lawsuit-against-fox-news>. Dominion's suit 'was one of about twenty lawsuits filed as a result of allegations of fraud in the conduct of the 2020 presidential election'. John Bruce Lewis & Bruce L. Ottley, '*New York Times v Sullivan* at 60: Where Does Defamation Law Go Now?', 73 *DePaul L. Rev.* 995, 1000 (2024).

[8] *US Dominion, Inc.*, 293 A.3d, 1063.

[9] Marshall Cohen & Oliver Darcy, 'Fox News settles with Dominion at the last second, pays more than $787 million to avert defamation trial over its 2020 election lies', *CNN.com*, 19 April 2023, <https://www.cnn.com/2023/04/18/media/fox-dominion-settlement/>.

[10] ibid.

[11] See Gregory Tardi, 'The Truth Shall Set Democracy Free', 18 *J. Parliamentary & Pol. L.* 1, 1, 8-9 (2024) (stating that '[t]he impact of disinformation and fake news is particularly virulent in regard to elections, meaning that it should also be studied as a factor in democracy' and referencing the Dominion lawsuit).

[12] *US Dominion, Inc.*, 293 A.3d, 1035.

[13] *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 124–25 (1996).

that accuse someone of serious crime or tend to harm their business constitute defamation *per se*.[14]

The state law elements of defamation are quite similar to the principles of defamation law in the United Kingdom.[15] U.S. defamation law began to differ dramatically from that of England in 1964, when the U.S. Supreme Court decided the case of *New York Times v Sullivan*.[16] *The New York Times* had published an advertisement that made accusations of police misconduct in the State of Alabama in connection with the civil rights movement.[17] Some of the details in the accusation were incorrect.[18] The police commissioner of Montgomery, Alabama sued the individuals who placed the advertisement and *The New York Times*, saying that they defamed him.[19] An Alabama jury agreed and ordered that the plaintiff be paid the full amount of damages claimed.[20]

The Supreme Court noted that it would violate the First Amendment of the U.S. Constitution,[21] protecting free speech, for a State to make it a crime to criticize public officials, even if the criticism contained some factual errors, because to do so would greatly mitigate such speech.[22] The Court reasoned that a State allowing a civil action for damages against those who criticize public officials, where the criticism contained some factual errors, would also unduly inhibit important political speech.[23] The Court stated, 'A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable 'self-censorship'.[24]

Accordingly, the Supreme Court held that courts could award damages in defamation cases brought by public officials only if the plaintiff could prove actual malice, meaning that the defendant made the defamatory statement with

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[14] *US Dominion, Inc.*, 293 A.3d, 1053.

[15] Vincent R. Johnson, 'Comparative Defamation Law: England and the United States', 24 U. Miami Int'l & Comp. L. Rev. 1, 4–6, 11–16 (2017).

[16] 376 U.S. 254 (1964).

[17] ibid 256.

[18] For example, the advertisement stated that the police had arrested Dr. Martin Luther King, Jr. seven times, when it was actually only four. ibid 259.

[19] ibid 256.

[20] ibid.

[21] The First Amendment provides that 'Congress shall make no law … abridging the freedom of speech, or of the press' <https://constitution.congress.gov/constitution/amendment-1/>.

[22] 376 U.S. 277. The Court stated, 'we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and government officials'. ibid 270.

[23] ibid 277–78.

[24] ibid 279.

knowledge that it was false or with reckless disregard as to its falsity.[25] 'Reckless disregard' means that 'the defendant in fact entertained serious doubts as to the truth of his publication'.[26] In a later case, the Supreme Court held that public figures – as well as public officials – must prove actual malice to recover for defamation.[27] The Court reasoned that such figures, while not holding public office, 'are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large'.[28] A party will constitute a public figure if they have thrust themselves or have been drawn into a public controversy and sought to influence its outcome.[29]

III. MOTIONS FOR SUMMARY JUDGMENT

A. STATE LAW ELEMENTS

Dominion's defamation claim was based on twenty statements made by Fox hosts or Trump attorneys, Sidney Powell and Rudy Guiliani.[30] The Superior Court of Delaware, applying New York law, concluded easily that the challenged statements were 'of and concerning' Dominion, noting that the statements mentioned Dominion by name.[31] The court also found that statements constituted defamation *per se* because they attacked the 'basic integrity' of Dominion's voting systems business.[32]

The issue of publication was more challenging. Publication means communication of the challenged statement to at least one third party, and each person who repeats it is responsible for any resulting damages.[33] Moreover, anyone who participated in the creation of the statement or who directed or participated in its communication satisfies the publication element.[34] The court concluded that Fox

[25] ibid 279–80.

[26] *St. Amant v Thompson*, 390 U.S. 727, 731 (1968).

[27] *Curtis Pub. Co. v Butts*, 388 U.S. 130 (1967).

[28] ibid 164 (Warren, C.J., concurring). The Court reasoned, 'Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'.

[29] *Hutchinson v Proxmire*, 443 U.S. 111, 134–135 (1979); *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

[30] *U.S. Dominion, Inc.*, 293 A.3d, 1014.

[31] ibid 1039.

[32] ibid 1053.

[33] ibid 1039.

[34] ibid 1040.

News Network satisfied the element of publication because it communicated the statements throughout its media network, including on its television broadcasts and social media platforms.[35]

It was less clear, however, that Fox Corporation, the parent company of Fox News, participated in the publication of the statements. Fox News hosts, employees, and executives testified that Fox Corp. was not involved in creating or communicating the statements.[36] Dominion contended that Rupert Murdoch and Lachlan Murdoch, the Chairman and Chief Executive Officer of Fox Corp., were fundamentally involved in the daily operations of Fox News through phone calls and emails about hosts, guests, topics, and narratives, including how to cover the 2020 election and the conspiracy claims.[37] Given this factual dispute, the court concluded that it would be up to a jury to determine whether Dominion had proved publication as to Fox Corp.[38]

On the element of falsity, Fox first attempted to argue that it was true that President Trump, through his attorneys Sidney Powell and Rudy Guiliani, claimed that Dominion had committed election fraud.[39] This is not the way falsity is determined under U.S. defamation law, however. What matters is whether the content of the allegedly defamatory statement – 'Dominion committed election fraud' – is false, not whether Fox accurately reported others' allegations about election fraud.[40] The rule in defamation law is that, unless some privilege applies, the party repeating the defamatory statement is liable himself for the publication, even if he states the source.[41]

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[35] ibid.

[36] ibid 1041.

[37] ibid 1042.

[38] ibid.

[39] ibid 1035, 1038.

[40] ibid 1038, 1039.

[41] *Restatement (Second) of Torts* § 578 (1997) ('one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it'); Jeffrey Standen, 'Republication Liability on the Web', 105 *Marq. L. Rev.* 669, 687 (2022) ('The republication standard requires each successive publisher to conduct a reasonable investigation into the veracity of the statements it intends to make, or to risk liability for reliance on the previous publisher'.); Dan B. Dobbs, *The Law of Torts* 1150 n.23 (2000) (stating that 'the repeater is liable for the defamatory statement and does not escape this liability merely because he has repeated the statement with precision'). This concept is sometimes stated as 'tale bearers are as bad as tale makers'. George Freeman, 'Long-Run Effects of Dominion v Fox', *Media Law Resource Center*, April 2023, <https://medialaw.org/long-run-effects-of-dominion-v-fox/>. The Communications Decency Act created a significant exception to this rule, providing that 'no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'. 47 U.S.C. § 230 (2018).

The court looked at each challenged statement and found that it was false.[42] The court noted that state audits and recounts, certification and testing of Dominion's machines, sworn testimony by the United States Election Assistance Commissioner, sworn testimony by Dominion, Dominion's source code, and the report of two independent testing laboratories all demonstrated that the statements were false, as did Fox's lack of evidence of the truth of its statements.[43] The court ended this section of the opinion by stating in italics: *'The evidence developed in this civil proceeding demonstrates that it is CRYSTAL clear that none of the [s]tatements relating to Dominion about the 2020 election are true'*.[44]

B. CONSTITUTIONAL LAW ELEMENTS: ACTUAL MALICE

In many defamation cases, the parties vigorously dispute whether the plaintiff is a public figure and thus must prove actual malice, or instead is a private figure and can prove a lesser amount of fault by the defendant.[45] In this case, while Dominion did not want the court to find it was a public figure, it nonetheless conceded that the actual malice standard applied to its claims against Fox.[46] The court noted that there was a public controversy over the 2020 election and Dominion was drawn into, and participated in that controversy.[47] Given that Dominion agreed to the application of the actual malice standard, the court concluded that it would treat Dominion as a public figure for the purpose of these defamation claims.[48]

The high bar of the actual malice standard is the reason that most defamation lawsuits in the United States fail.[49] Accordingly, it is somewhat surprising that Dominion conceded that the actual malice standard applied. Dominion contended, however, that this was 'the rare defamation case with extensive direct evidence of actual malice'.[50] Evidence revealed through the discovery process indicated

[42] *U.S. Dominion, Inc.*, 293 A.3d, 1036–1039.

[43] ibid.

[44] ibid 1039.

[45] Matthew D. Bunker, 'Corporate Chaos: The Muddled Jurisprudence of Corporate Public Figures', 23 *Comm. L. & Pol'y* 1, 1 (2018) (noting that 'the divide between public and private status for a defamation plaintiff can be – and frequently is – the determinative factor in whether a plaintiff can succeed').

[46] *US Dominion, Inc. v Fox News Network, LLC*, 2023 WL 568869, at *1 (Del. Super. Ct 27 January, 2023).

[47] ibid *2 (stating that 'the nature and degree of Dominion's participation in that particular controversy is extensive').

[48] ibid.

[49] *Berisha v Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting) (stating that 'the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability').

[50] *US Dominion, Inc.*, 293 A.3d, 1044.

that many people at Fox doubted the truth of the election fraud allegations against Dominion.[51] Fox's Political Editor testified in a deposition that 'he did not believe the allegations, that 'no reasonable person' would have believed them, and confirmed that this was a widely held belief among the news people he talked with'.[52]

Beginning on 20 November 2020, Dominion sent numerous 'Setting the Record Straight' emails to Fox News' reporters and producers, providing facts and links debunking Fox's statements.[53] On the same day, the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Agency issued a statement calling the 2020 election 'the most secure in American history' and attesting that '[t]here is no evidence that a voting system deleted or lost votes, changed votes, or was in any way compromised'.[54] Fox reporters, producers, and hosts were aware of that statement, and – after receiving it – some of them exchanged emails debunking the election fraud claims.[55] One producer on the Lou Dobbs show, which repeatedly featured Trump attorney Sidney Powell, texted others at Fox that Powell was 'doing lsd and cocaine and heroin and shrooms'.[56] Before Powell appeared on Fox Host Maria Bartiromo's show on 8 November 2020, she sent Bartiromo an email from one of her sources for the proposition that Dominion machines flipped votes. The source stated that she has visions and was 'internally decapitated', and that her information came from a combination of dreams and time travel.[57] Despite the clear unreliability of this source, neither Bartiromo nor her producers questioned Powell on this point.[58]

Fox, in contrast, asserted that its hosts believed the allegations, or at least did not flatly disbelieve them because they were made by the United States President and his attorneys.[59] Fox emphasized the 'critical difference between not knowing whether something is true and being highly aware that is probably false'.[60] More-

[51] ibid, 1044 n.362 (citing deposition testimony of numerous Fox employees who stated that they never believed the allegations).

[52] ibid 1044–45.

[53] ibid 1023–24.

[54] ibid 1025.

[55] ibid 1046.

[56] ibid.

[57] ibid 1045; Jim Rutenberg, Michael S. Schmidt & Jeremy W. Peters, 'Missteps and Miscalculations: Inside Fox's Legal and Business Debacle', New York Times, 27 May 2023, <https://www.nytimes.com/2023/05/27/business/media/fox-news-dominion-voting.html>. The source also stated, 'The wind tells me I'm a ghost but I don't believe it'. A First Amendment lawyer said that 'if he ever stumbled upon such an email in a client's files, he would 'physically wrest my client's checkbook away from them and settle before the police arrive'.

[58] *US Dominion, Inc.*, 293 A.3d, 1045.

[59] ibid 1049–50 (stating that 'a publisher's reliance on elected officials … shows an absence of actual malice').

[60] ibid 1049.

over, Fox contended that Dominion's 'Setting the Record Straight' emails were 'self-serving denials' about which Fox employees were appropriately skeptical, and thus were insufficient to prove that those employees actually entertained serious doubts about the truth of the election fraud allegations.[61] Fox also argued that the allegations were not inherently implausible 'because in the past, experts and politicians alike have raised concerns about electronic voting systems' vulnerabilities'.[62]

The court found that genuine issues of material fact remained as to which Fox employees were responsible for publication of each defamatory statement and if such individuals acted with actual malice.[63] Accordingly, the court declined to grant summary judgment to either party on the issue of actual malice.[64] Actual malice would be an issue for the jury to decide.

Why, then, did Fox agree to settle the case for $787.5 million, rather than taking their chances with a jury? One major reason is the court's rejection of Fox's remaining three defenses.

C. REMAINING DEFENSES: PRIVILEGES OF OPINION, FAIR REPORT, AND NEUTRAL REPORTAGE

Fox asserted that it could not be held liable for defamation based on the challenged statements because they were statements of opinion, not fact.[65] Under the U.S. Constitution, there is no absolute constitutional protection from defamation actions for expressions of opinion.[66] New York law applied to this case, however, and the New York Constitution does protect 'expressions of "pure" opinion'.[67] If a statement reasonably implies an assertion of fact, and can be proven false, it is not a pure opinion, and it can be the basis of a defamation action.[68] Moreover, 'mixed opinions', statements of opinion which imply that they are based on facts unknown to the viewer or listener, are also actionable in defamation.[69] The distinction between constitutionally-protected opinion and unprotected statements of fact or mixed opinions is a question for the court to decide as a matter of law; it is not a matter for the jury to decide.[70]

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[61] ibid 1051.
[62] ibid 1050.
[63] ibid 1052–53.
[64] ibid.
[65] ibid 1061.
[66] *Milkovich v Lorain Journal Co.*, 497 U.S. 1, 21 (1990).
[67] *US Dominion, Inc.*, 293 A.3d,1063.
[68] ibid 1064.
[69] ibid 1065.
[70] ibid 1060.

The task for the court was to determine whether the challenged expressions reasonably appeared to state or imply assertions of objective fact about Dominion.[71] Fox contended that a reasonable viewer would not understand its hosts' statements about Dominion to convey facts because this was 'spirited debate on opinion shows' and involved 'loose, figurative, and hyperbolic language'.[72] In a voluminous Appendix to its decision, the court examined all twenty challenged statements, in context, and concluded that each was either a statement of fact or a mixed opinion.[73] For example, regarding the exchange between Trump attorney Sidney Powell and Fox News Host Maria Bartiromo referenced in the Introduction, the court noted that language such as 'Sidney, we talked about the Dominion software. I know there were voting irregularities' 'indicates to the reasonable viewer that the events in question actually occurred, and Bartiromo's questioning of her guests is an inquiry of *what* the evidence is, not whether the evidence *exists* in the first place'.[74] According to the court, the statement 'use[d] precise and readily understood language to assert facts that are capable of being proven true or false'.[75]

The court also reasoned that the context of the statements – 'made by newscasters holding themselves out to be sources of accurate information' – did not indicate that the statements were pure opinion.[76] Fox News hosts claimed to be engaged in truth-seeking and to base their interview questions on evidence and judicial proceedings.[77] Finally, to the extent that the statements allege that Dominion committed the crime of election fraud, '[a]ccusations of criminal activity, even in the form of opinion, are not constitutionally protected'.[78]

Fox also asserted the privilege of fair report. First developed through common law, this privilege is an exception to the general rule that a party repeating a defamatory statement is liable himself for the publication.[79] A reporter is privileged to provide a fair and accurate report of public proceedings, public documents, and information of public concern uttered at public meetings.[80] The rationale behind the privilege is that the reporter is 'a conduit for information that citizens have

[71] ibid 1061.
[72] ibid 1061.
[73] ibid 1063–1102.
[74] ibid 1067.
[75] ibid.
[76] ibid 1062.
[77] ibid.
[78] ibid 1063.
[79] Dobbs, *supra* note 41, 1162.
[80] ibid 1162–64.

a right to see for themselves'.[81] The privilege applies even when the reporter knows that the underlying facts – such as statements in a legal document – are false.[82]

Under New York law, the fair report privilege was codified as applying to a fair and true report of an official proceeding.[83] For the privilege to apply, the report must 'comment[] on a proceeding, not the underlying events of such a proceeding'.[84] The privilege would apply, for example, to an accurate report of a lawsuit. Fox contended that the fair report privilege should apply to all the challenged statements because they involved the press covering or commenting on investigations and proceedings.[85]

Trump attorneys Powell and Guiliani filed several lawsuits challenging the results of the 2020 election. If the statements only accurately reported those lawsuits, the fair report privilege would apply. The court noted, however, that most of the statements were made before any lawsuit was filed.[86] Only one of the statements referred to an official proceeding, and the court found that the fair report privilege did not apply to that statement.[87] The statement involved Powell appearing on *Lou Dobbs Tonight* and alleging that 'all the machines are infected with the software code that allows Dominion to share votes', describing Dominion's actions as 'the most massive and historical egregious fraud the world has ever seen'.[88] Because the statement was about the underlying facts behind the lawsuit/proceeding, and was not an accurate report of the lawsuit itself, the fair report privilege did not apply.[89]

Fox appears to have believed that its strongest defense to Dominion's defamation lawsuit was the privilege of neutral reportage. This privilege shields unbiased reports of newsworthy defamatory statements, even when the reporter knows that the statements are untrue.[90] Fox began its first motion to dismiss Dominion's defamation lawsuit with the following paragraph: 'A free press must be able to report both sides of a story involving claims striking at the core of our democracy, especially when those claims prompt numerous lawsuits, government investigations, and election recounts. When a sitting President of the United States and his legal team challenge a presidential election in litigation throughout the nation,

[81] ibid 1162.

[82] ibid 1162–63.

[83] *US Dominion, Inc.*, 293 A.3d, 1060.

[84] ibid 1058.

[85] ibid 1059.

[86] ibid 1060.

[87] ibid.

[88] ibid.

[89] ibid.

[90] Dan Laidman, 'When the Slander Is the Story: The Neutral Reportage Privilege in Theory and Practice', 17 UCLA L. Rev. 74, 76 (2010).

the media can truthfully report and comment on those allegations under the First Amendment without fear of liability. Plaintiffs' defamation lawsuit against Fox News threatens to stifle the media's free-speech right to inform the public about newsworthy allegations of paramount public concern'.[91]

The privilege of neutral reportage was first recognized in 1977 in the case of *Edwards v National Audubon Society*.[92] The National Audubon Society had accused several prominent scientists of being paid by the pesticide industry to minimize the effect of the pesticide DDT on the bird population, and *The New York Times* published an article reporting the accusation that the scientists were paid liars.[93] The court did not focus its reasoning on whether *The New York Times* reporter knew that the 'paid liar' accusation was false. Rather, the court held that 'when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity'.[94] According to the court, '[w]hat is newsworthy about such accusations is that they were made', and '[t]he public interest in being fully informed about controversies that often range around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them'.[95]

The U.S. President accusing a company that makes electronic voting machines of election fraud that changed the result of the 2020 Presidential Election certainly seems newsworthy, regardless of the truth of the accusations. The problem for Fox, however, is that the U.S. Supreme Court has never directly addressed the privilege of neutral reportage,[96] only a minority of courts have recognized the privilege,[97] and the trend is against recognizing it.[98] Perhaps most significantly, the privilege is not recognized under New York law, the law that applied to Dominion's defamation claim.[99]

Numerous commentators have argued that courts should recognize the privilege of neutral reportage as protecting important speech of great concern

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[91] *US Dominion, Inc. v Fox News Network, LLC*, Defendant's Brief in Support of Its Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, 2021 WL 10330903 (18 May 2021).

[92] 556 F.2d 113 (2nd Cir. 1977).

[93] ibid 116–18.

[94] ibid 120.

[95] ibid.

[96] Laidman, *supra* note 90, 76.

[97] Victor Schwartz, Kathryn Kelly & David Partlett, *Prosser, Wade, and Schwartz's Torts Cases and Materials* 2020, 14 ed., 1010.

[98] Christine Mazzeo, 'Neutral Reportage Privilege: The Libel Defense Needed in a Struggling Democracy', Master's Theses (2009–) 548, <https://epublications.marquette.edu/theses_open/548> 62.

[99] *US Dominion, Inc.*, 293 A.3d, 1056 (citing *Hogan v Herald*, 84 A.D.2d 470 [4th Dept. 1982]).

to the public.[100] In support of that contention, they often cite the case of *Norton v Glenn*.[101] Following a city council meeting, city council member William Glenn characterized another member, James Norton, and the mayor as 'queers and child molesters'.[102] A newspaper reporter who heard the comments wrote an article headlined 'Slurs, insults drag town into controversy', which included the quotes from Glenn and described Norton and the mayor as denying the charges and calling the comments 'bizarre' and 'sad'.[103] Norton and the mayor sued Glenn, the reporter, and the newspaper for defamation.[104]

The reporter and the newspaper's editors did not believe that Glenn's accusations were true, so the actual malice standard would provide them with no protection against the plaintiffs' defamation claims. Rather, the editors reasoned that voters should know that an elected official was making unhinged, unsupported accusations about his colleagues;[105] in other words, the statements said much more about Glenn than they said about the plaintiffs. Moreover, the article may have succeeded in conveying that information to voters – in the next election, voters chose to remove Glenn from office and retain the plaintiffs.[106] The trial court instructed the jury about the privilege of neutral reportage, and they found that, 'because the Article accurately conveyed the gist of the statements Glenn made and did not imply that the Media Defendants adopted or concurred in those statements', the reporter and the newspaper were not liable for defamation.[107]

The Pennsylvania Supreme Court reversed, holding that the neutral reportage privilege was not encompassed within the First Amendment of the U.S. Constitution.[108] The court reasoned that, throughout its defamation jurisprudence, the U.S. Supreme Court has never granted media defendants blanket immunity for publishing defamatory statements.[109] Instead the Court has strived to strike a balance 'between the First Amendment's guarantee of freedom of expression and the states' right to offer protection to a citizen's reputation via a defamation action'.[110] The Court has

[100] See, e.g., Laidman, *supra* note 90; Mazzeo, *supra* note 98; Naomi Sosner & George Freeman, 'The Neutral Reportage Doctrine: MIA. Doesn't Good Journalism Demand It?', 33-WTR Comm. Law 14 (2018).

[101] 580 Pa. 212 (2004)

[102] ibid 215.

[103] ibid 215–16.

[104] ibid 216.

[105] Sosner & Freeman, *supra* note 100, 15.

[106] ibid.

[107] 580 Pa. 217. The jury found that Mr. Glenn had made the statements with actual malice and held him liable for defamation. ibid.

[108] ibid 215. The court also found that the Pennsylvania Constitution did not support such a privilege.

[109] ibid 225.

[110] ibid 226.

recognized the importance of defamation actions, stating that '[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential worth of every human being – a concept at the root of any decent system of ordered liberty'.[111]

For speech about public officials and public figures, the Court has struck that balance via the actual malice standard, which 'forbid[s] imposition of liability even in those instances where the defendant negligently publishes false, defamatory statements'.[112] The *Norton* court concluded that '[i]n light of the high Court's consistent application of the actual malice standard in these types of cases, and its cautions that free expression law should be balanced against, and not be allowed to obliterate, state law protections to reputation', the Court would not 'jettison the actual malice standard in favor of the neutral reportage doctrine'.[113] The media defendants in *Norton* sought to appeal to the U.S. Supreme Court – giving the Court an opportunity to state definitively whether the First Amendment required recognition of the privilege of neutral reportage – but the Court refused to hear the case.[114]

The *Dominion* court cited with approval the *Norton* court's reasoning that 'the neutral report privilege is not necessary because the actual malice standard provides considerable protection to the media in defamation actions' and that the privilege would 'eliminate a state's power to provide protection to person's reputation through a defamation lawsuit'.[115]

The *Dominion* judge's rulings on summary judgment rendered Fox unable to argue to the jury that its statements were constitutionally protected opinion, fair report of public proceedings, or neutral newsworthy accusations made by President Trump and his lawyers.[116] *Dominion v Fox* could have given the U.S. Supreme Court another opportunity to rule on the privilege of neutral reportage, but Fox decided to settle the case on the eve of trial instead.

IV. CONCLUSION

What does *Dominion v Fox* mean for the Rule of Law? Amid all the controversy over the 2020 U.S. Presidential Election, there is a value in having a judicial

[111] ibid 225–26 (quoting *Milkovich*, 497 U.S., 22).

[112] ibid.

[113] ibid 226–27.

[114] Laidman, *supra* note 90, 76–77.

[115] *US Dominion, Inc.*, 293 A.3d, 1058.

[116] Jeremy W. Peters, 'Judge Limits Fox's Options for Defense in Dominion Trial', *New York Times*, 11 April 2023, <https://www.nytimes.com/2023/04/11/business/fox-news-dominion-trial.html>.

opinion declaring that – at least as far as Dominion was concerned – there was no election fraud. While Fox did not apologize to Dominion as part of the settlement, it did say in a statement: 'We acknowledge the Court's rulings finding certain claims about Dominion to be false'.[117]

This case arose at a time when U.S. defamation law has faced considerable criticism. It is often criticized as overprotecting false speech and under-protecting individuals' reputations, particularly when compared to defamation law elsewhere.[118] Two Justices of the United States Supreme Court have expressed the view that *New York Times v Sullivan*, the seminal case constitutionalizing U.S. defamation law, should be overruled.[119] Both scholars[120] and politicians[121] have asserted that, while defamation law could serve a valuable role in combatting disinformation, the actual malice standard presents too great an obstacle.[122]

The circumstances under which the *Dominion* case arose, however, serve as a reminder of the value of the actual malice standard. Like *Dominion*, *New York Times v Sullivan* itself took place in a tense political climate.[123] Public officials in the southern United States were using defamation law to silence media coverage

[117] Matt Taylor, 'Fox News reaches $787.5 million settlement in Dominion's defamation lawsuit', Politico, 18 April 2023, <https://www.politico.com/news/2023/04/18/fox-news-reaches-settlement-with-dominion-in-defamation-lawsuit-00092621>.

[118] See, e.g., Jeannie Suk Gersen, 'The Dark Side of Defamation Law', *The New Yorker*, 11 May 2023, <https://www.newyorker.com/magazine/2023/05/22/the-dark-side-of-defamation-law>; Michal Lavi, 'Publish, Share, Re-Tweet, and Repeat', 54 U. Mich. J.L. Reform 441, 471–72 (2021).

[119] *Berisha v Lawson*, 141 S.Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting from denial of certiorari) (stating that constitutionalizing defamation law not only has 'evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted'); *McKee v Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari) (stating that '*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law' and did not 'simply apply[] the First Amendment as it was understood by the people who ratified it').

[120] See, e.g., David A. Logan, 'Rescuing Our Democracy by Rethinking *New York Times v Sullivan'*, 81 Ohio St. L. J. 759 (2020).

[121] During his first term in office, President Trump stated, 'We are going to take a strong look at our country's libel laws, so that when somebody says something that is false and defamatory about someone, that person will have meaningful recourse in our courts'. Michael M. Grynbaum, 'Trump Renews Pledge to "Take a Strong Look" at Libel Laws', *New York Times*, 10 January 2018, <https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>.

[122] Lewis & Ottley, *supra* note 7, 998 (stating that the actual malice standard 'is being challenged more now by political figures, judges, and scholars than at any time since *Sullivan* was decided').

[123] Amy Kristin Sanders, 'Revisiting *Rosenbloom*: Can a Return to the "Matter of Public Concern" Standard in Defamation Cases Quiet *Sullivan* Skeptics?', 88 Mo. L. Rev. 769, 774 (2023) (noting that '[m]any parallels can be found between the decade leading up to *Sullivan* and the current times once *Sullivan* is examined in its full context as a civil rights case').

about the civil rights movement, which was critical of those officials.[124] Evidence suggests that political leaders in the United States today are similarly interested in using defamation law to attack media criticizing them.[125] The activities of a free press are central to a flourishing democracy.[126] The actual malice standard provides breathing room for political speech, allowing media defendants space to reveal information about public officials and figures without fearing that an inadvertent factual error will expose them to ruinous liability.[127] As noted by one commentator arguing in support of the actual malice standard, 'A nation's defamation law can be a strong indicator of how it accepts political dissent and whether it respects or safeguards wide-open discourse'.[128]

Even though a media defendant, by agreeing to pay an enormous sum of money, lost the *Dominion* case, that loss ultimately benefits the media as a whole.[129] Critics of the actual malice standard had argued that the standard made it impossible for public officials or figures to win a defamation case,[130] and *Dominion* proved that was untrue.[131] Finding that a defamation plaintiff is a public official or figure – and thus that the actual malice standard applies – does not

[124] (n 123) 777.

[125] David Enrich, 'Trump and His Picks Threaten More Lawsuits About Critical Coverage', *New York Times*, 14 December 2024, <https://www.nytimes.com/2024/12/15/business/media/trump-defamation-lawsuit-abc-hegseth-cnn.html>; First Amendment Watch, 'Trump Suing for Defamation', <https://firstamendmentwatch.org/tag/trump-suing-for-defamation/> (accessed 11 March 2025) (listing the defamation lawsuits against media defendants filed by Donald Trump). accessed 11 March 2025 (listing the defamation lawsuits against media defendants filed by Donald Trump).

[126] *New York Times v U.S.*, 403 U.S. 713, 717 (1971) (Black., J., concurring) (stating that '[i]n the First Amendment the Founders gave the free press the protection it must have to fulfill its central role in our democracy', that '[t]he press was protected so that it could bare the secrets of government and inform the people', and that '[o]nly a free and unrestrained press can effectively expose deception in government'). See Sanders, *supra* note 123, 773 (stating that 'a rollback in constitutional protection for speech – particularly criticism of government officials or issues important to our communities – poses a grave threat to our nation's democratic foundation').

[127] *Sullivan*, 376 U.S. 271-72; Jeff Kosseff, 'What Protects Fox News Also Protects Our Democracy', *New York Times*, 14 April 2023, <https://www.nytimes.com/2023/04/14/opinion/dominion-fox-news-supreme-court-sullivan.html>.

[128] Roy S. Gutterman, 'Actually … A Renewed Stand for the First Amendment Actual Malice Defense', 68 Syracuse L. Rev. 579, 585 (2018). See also Lyrissa Lidsky, 'Cheap Speech and the Gordian Knot of Defamation Reform', 3 J. Free Speech L. 79, 80 (2023) (arguing that '[m]erely rolling back constitutional protections will not deliver the proper balance between protecting individual reputation and safeguarding the types of speech that contribute to informed decision-making, because powerful people will increasingly use defamation law to punish their critics').

[129] Freeman, *supra* note 41.

[130] *Berisha*, 141 S.Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari) (describing the standard as 'an effective immunity from liability'); Freeman, *supra* note 41.

[131] Lewis & Ottley, *supra* note 7, 1040; Freeman, *supra* note 41.

mean that the plaintiff automatically loses. Accordingly, '*Dominion v Fox* might ironically have as its legacy the continued retention of this [*Sullivan*] precedent and might just auger the end of the attack against it'.[132]

Those concerned about rampant disinformation in the United States today have argued that the high bar of the actual malice standard renders defamation law useless as a means for correcting disinformation and promoting truth.[133] However, there is a value in allowing liability for defamation about a public actor only when one can prove that the speaker actually knew what they were saying was false. Supporters of the Republican Party in the United States place a great deal of trust in Fox News.[134] Arguments about whether Fox was unreasonable or failed to use due care in reporting about Dominion may not be enough to convince them that Dominion did not rig the 2020 U.S. Presidential Election. Showing that Fox News reporters, producers, and hosts made purposeful, knowing lies may be more persuasive.[135]

The very difficulty of satisfying the actual malice standard made it particularly meaningful when the judge in *Dominion v Fox* held that a reasonable jury could find that Fox hosts and producers acted with actual malice. Actual malice involves an inquiry into what the speaker actually believed,[136] which meant extensive discovery and disclosure of Fox employees' own statements revealing that they knew the Dominion allegations were false but presented them anyway.[137] Evidence indicated that Fox knew that the election fraud claims were unfounded but repeated them in order to satisfy the demands of their Trump-loyal audience and to avoid losing that audience to competing conservative news outlets.[138]

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[132] Freeman, *supra* note 41.

[133] Logan, *supra* note 120, 763 (asserting that 'there is now what amounts to an absolute immunity from damages actions for false statements, and this evisceration of the deterrent power of defamation law has facilitated a torrent of false information entering our public square'); Lili Levi, 'Disinformation and the Defamation Renaissance: A Misleading Promise of "Truth"', 57 U. Rich. L. Rev. 1235, 1244 (2023) (noting that '[t]he attack on the *Sullivan* regime found rich new ground in a line of influential scholarship focusing on the democratic harms of political distortion and disinformation').

[134] Taylor Orth & Carl Bialik, 'Trust in Media 2024: Which news sources Americans trust – and which they think lean left or right', YouGov, 30 May 2024, <https://today.yougov.com/politics/articles/49552-trust-in-media-2024-which-news-outlets-americans-trust>.

[135] Lewis & Ottley, *supra* note 7, 1033–35.

[136] *St. Amant*, 390 U.S., 731.

[137] Lewis & Ottley, *supra* note 7, 1033-35 (noting that '[i]n their depositions, many Fox executives and on-air hosts stated that they never believed the claims being made against Dominion by guests such as Sidney Powell and Rudy Guiliani' and that the deposition of Fox Corp. Chairman Rupert Murdoch was particularly damaging as '[h]e repeatedly rejected the conspiracy theories made by Fox News hosts after the election').

[138] *US Dominion, Inc.*, 293 A.3d, 1020–22, 1026–28.

The kind of evidence needed to prove actual malice may be the evidence most likely to convince those otherwise susceptible to disinformation.

Alongside the arguments about the actual malice standard providing too much protection of speech, commentators have argued that courts' failure to consistently recognize the privilege of neutral reportage results in insufficient protection of important speech.[139] Fox's Chief Legal Officer Viet Dinh stated in an interview before the Dominion lawsuit, 'The newsworthy nature of the contested presidential election deserved full and fair coverage from all journalists. Fox News did its job, and this is what the First Amendment protects'.[140] Another attorney for Fox asserted, 'If the president of the United States is alleging that there was fraud in the election, that's newsworthy, whether or not there's fraud in the election. It's the most newsworthy thing imaginable'.[141]

The courts that have rejected the privilege of neutral reportage, however, have reasoned that the privilege is inconsistent with the balance between reputation and speech struck by the U.S. Supreme Court. Even when a reporter's goal in repeating a defamatory statement is shedding a light on the speaker, as in *Norton v Glenn*, repeating and spreading the defamation negatively affects the plaintiff. The mayor in that case, a decade after the article was published, continued to think about the allegations and avoided being alone with children due to the taint of being accused of child molestation.[142] If Glenn's accusations had only been heard by those within earshot, there would have been much less effect on the plaintiffs' reputations.

Similarly, Dominion argued that, through Fox's broadcasting allegations about Dominion that Fox knew were false, 'Fox took a small flame and turned it into a forest fire. As the dominant media company among those viewers dissatisfied with election results, Fox gave these fictions a prominence they otherwise would never have achieved. With Fox's global platform, an audience of hundreds of millions, and the inevitable and extensive republication and dissemination of the falsehoods through social media, these lies deeply damaged Dominion's once-thriving business'.[143]

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[139] See *supra* note 100; Shelly Rosenfeld, 'The Paper Case : The Neutral Reportage Privilege in Defamation Cases and Its Impact on the First Amendment', 19 Vill. Sports & Ent. L.J. 135, 140 (2012) (asserting that 'the neutral reportage privilege is essential to the freedom of the press that the First Amendment requires').

[140] David Lat, 'Is Viet Dinh The Most Powerful Lawyer in America?' Original Jurisdiction, 17 March 2021, <https://davidlat.substack.com/p/is-viet-dinh-the-most-powerful-lawyer>.

[141] Rutenberg and others, *supra* note 57.

[142] Laidman, *supra* note 90, 102.

[143] *US Dominion, Inc. v Fox News Network, LLC*, 2021 WL 1153152 (Del. Super.) (26 March 2021) (Dominion's Complaint).

Proponents of the privilege of neutral reportage often argue that it is a necessary corollary of the privilege of fair report. As stated by one scholar, '[t]he fair report privilege, while vital to promoting the public's knowledge of governmental actions, is incomplete in that important issues about public issues and officials' fitness for office is just as likely to come from statements made in interviews, press conferences, campaign events or myriad other settings as it is in a public meeting or official report'.[144] If reporters are aware, however, that they can safely repeat statements they know are false only if those statements occur in public documents or proceedings, two things are likely to happen. First, fewer falsehoods will be repeated, causing less harm to reputation. Second, the most egregious falsehoods – the ones that even the original speaker knows are false – will not get spread because the original speaker will hesitate before putting the statement in a legal document. While Sidney Powell filed lawsuits seeking to overturn the election in four states, including Georgia, she did not include some of her most outrageous allegations about Dominion in those lawsuits, such as her claim that Dominion made kickbacks to Georgia officials for using their machines in the 2020 election.[145] As an attorney, Powell was aware that knowingly including false statements in a legal document would imperil her license to practice law.

Even if the *Dominion* court had recognized the privilege of neutral reportage, it might not have applied because Fox's reporting was arguably not neutral. The court noted that Fox's 'failure to reveal extensive contradicting evidence from the public sphere and Dominion itself indicates that its reporting was not disinterested'.[146] Fox hosts not only repeated Powell and Giuliani's allegations about Dominion, they endorsed those allegations. In their Complaint, Dominion emphasized Fox's business motive in spreading the election fraud allegations: 'Fox, one of the most powerful media companies in the United States, gave life to a manufactured storyline about election fraud that cast a then-little-known voting company called Dominion as the villain. After the 3 November 2020 Presidential Election, viewers began fleeing Fox in favor of media outlets endorsing the lie that massive fraud caused President Trump to lose the election. They saw Fox as insufficiently supportive of President Trump, including because Fox was the first network to declare that President Trump lost Arizona. So Fox set out to lure

[144] Laidman, *supra* note 90, 80.

[145] Alan Feuer, 'Dominion demands that Sidney Powell retract "baseless and false allegations' about voting machines", *New York Times*, 17 December 2020, <https://www.nytimes.com/2020/12/17/us/dominion-demands-that-sidney-powell-retract-baseless-and-false-allegations-about-voting-machines.html>.

[146] *US Dominion, Inc.*, 293 A.3d, 1058.

viewers back – including President Trump himself – by intentionally and falsely blaming Dominion for President Trump's loss by rigging the election'.[147]

Nonetheless, the *Dominion* case highlights the danger the privilege of neutral reportage would pose to reputation. Fox defended its reporting by emphasizing the newsworthiness of the U.S. President claiming that the election had been stolen. Under that reasoning, the more outrageous an elected official's statement was, the more newsworthy it would be, and the privilege of neutral reportage would allow the media to publicize that statement. Yet even if the motive of the media is to shine a negative light on the speaker/elected official, some people will believe the lies. The events of 6 January 2021 are a testament to that. An angry mob attempting by force to stop the United States Congress from formalizing the victory of the President-Elect, in order to keep the current President in power, is the antithesis of the Rule of Law.

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SEX-SELECTIVE ABORTION AND THE SUBJECT OF DISCRIMINATION

Abstract

The United Nations estimates that there are currently 140 million 'missing women' worldwide, a phenomenon largely attributed to the cultural 'son preference'. This issue, often referred to by commentators and scholars as 'gendercide', raises significant moral and legal questions. The discourse surrounding the appropriate measures to address this issue presents intricate dilemmas. On the one hand, sex-selective abortion predominantly eliminates female fetuses, which should be a grave concern for advocates of women's rights. On the other hand, imposing restrictions on this practice risks limiting access to abortion more broadly, undermining key justifications for its legality.

This Article offers a comprehensive global analysis of the issue, examining three primary approaches: banning sex-selective abortion while allowing abortion in general, refusing to ban any form of abortion, and viewing all abortions as unacceptable. The analysis is conducted primarily from the perspective of logical consistency, comparing the underlying rationales of these positions and critically evaluating them. Furthermore, the Article explores the concept of replacing biological humanity with the notion of personhood and discusses the principle of non-discrimination as understood in international human rights law.

KEYWORDS

sex selective abortion, human rights, discrimination, personhood

SŁOWA KLUCZOWE

aborcja selektywna ze względu na płeć, prawa człowieka, dyskryminacja, osobowość

I. INTRODUCTION

Sex-selective abortion could be described as one of the 'hard cases' for advocates of abortion rights, probably compared only with the instances of late-term abortions for non-medical reasons. On the one hand, it reduces the population of women by eliminating mostly female fetuses, which should alarm those who advocate for women's rights. On the other hand, however, any restrictions on this practice are likely to affect access to abortion in general and undermine some of its crucial justifications. It is difficult to condemn it without portraying abortion as such in a negative light, and both sides of the debate are perfectly aware of this. The discussions in law and policy have been ongoing and no real consensus is in sight. Commentators and scholars not only debate whether sex-selective abortion should be prohibited or how to prohibit it effectively, but first and foremost, they cannot agree on the rationale behind these prohibitions and on who is to be considered the primary subject of discrimination. Historically, practical agreements on the content of human rights have been reached despite underlying disagreements on their sources and origins.[1] The situation at stake, however, appears fundamentally different as the disagreement delves much deeper – to the question of who counts as human and, therefore, who can be a holder of human rights.

This Article begins by providing a global overview of sex-selective abortion and its worldwide consequences. It then proceeds to analyze relevant laws, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), alongside recommendations and guidelines from international bodies. This background serves to introduce the central argument of the Article – that sex-selective abortion can only be condemned if abortion, in general, is deemed to be wrong. To discuss and defend this view, the Article analyzes the positions of those scholars and thinkers who: a) would be willing to ban sex-selective abortion but not abortion in general; b) refuse to ban any

[1] On the 'agreement on disagreement' on sources and origins of human rights during the negotiations on the Universal Declaration of Human Rights see e.g. Robert P. George, 'Natural Law, God and Human Dignity' in George Duke and Robert P. George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (CUP 2017) 57. See also Jacques Maritain, *Man and the State* (University of Chicago Press 1951) 76.

kind of abortion; c) regard abortion in general as unacceptable and, therefore, support a ban on sex-selective abortion. It does so from the perspective of human dignity, equality, and consistency of arguments, using to this end the concepts of non- discrimination and personhood.

II. OVERVIEW OF THE ISSUE

The social preference for children of a specific sex – usually boys – is not a new phenomenon, Historically, this bias has led to practices such as infanticide and mistreatment of girls, even resulting in their premature death.[2] Only recently, however, due to the developments in medical technology, also prenatal sex selection became a widespread and problematic issue. Methods vary and may include preconception methods such as sperm sorting, pre-implantation sex diagnosis and the following implantation of the embryo of a desired sex, or abortions of the fetuses of undesired sex, most often females.[3] For the purposes of clarity, the Article focuses on the last possibility and analyzes only cases when prenatal sex selection is pursued for non-medical reasons. Moreover, even though, on some occasions, women decide to undergo sex-selective abortions because they want to have a daughter instead of a son, this scenario is significantly less common and, therefore, I concentrate on abortions that aim to eliminate female fetuses. Both situations are obviously morally equivalent.

The typical sex ratio at birth ranges from 102 to 106 males per 100 females,[4] but in some instances, ratios as high as 130 have been observed.[5] Sex-selective abortion is most notorious and most prevalent in China and India, which are the two most populous countries in the world, but evidence suggests that it is not only limited to them.[6] China banned sex-selective abortion in 2003, but this measure

[2] See e.g. Amartya Sen, 'Missing Women – Revisited' (2003) 327 BMJ 1297; Shareen Joshi, 'Missing Women and Violent Crimes in India: More Than a Correlation?' (2014) 15 Georgetown Journal of International Affairs 35.

[3] UNFPA, *Guidance Note on Prenatal Sex Selection* (2010) <https://unfpa.org/sites/default/files/resource-pdf/guidenote_prenatal_sexselection.pdf> accessed 15 December 2024.

[4] OHCHR, UNFPA, UNICEF, UN Women and WHO, *Preventing Gender-Biased Sex Selection: An Interagency Statement* (2011) <https://www.unfpa.org/sites/default/files/resource-pdf/Preventing_gender-biased_sex_selection.pdf> accessed 15 December 2024.

[5] ibid.

[6] John Bongaarts and Christophe Z. Guilmoto, 'How Many More Missing Women? Excess Female Mortality and Prenatal Sex Selection, 1970–2050' (2015) 41 Population and Development Review 241.

did not prove to be particularly effective.[7] Given the long-standing one-child policy, relaxed only in 2015, there still remains a strong social preference for boys, especially in rural areas.[8] Similarly, although already in 1994, the Indian Parliament passed the first national law banning sex-selective abortion,[9] there may be as many as 6.8 million fewer girls being born in India by 2030.[10] The problem was also widespread in South Korea (in particular before a ban on revealing a child's sex before birth),[11] Vietnam,[12] Nepal[13] or Taiwan.[14] Moreover, official data show an elevated sex ratio in three post-Soviet states – Armenia (117), Azerbaijan (116) and Georgia (121).[15] In the United States concerns arise mainly in the context of immigrants who, according to some, would be more likely to resort to sex-selective abortions if they were pregnant with girls.[16] The opponents of the ban argue that the prohibitions could lead to racial profiling of Asian American women and placing access barriers on women seeking abortions.[17] In 2012, the House of Representatives debated, but at the end did not enact, the Prenatal Non-Discrimination Act (PRENDA) aimed at banning sex-selective abortions.[18]

[7] Congressional-Executive Commission on China, *Annual Report 2011* (2011) 125.

[8] Xiaojie Wang, Wenjie Nie and Pengcheng Liu, 'Son Preference and the Reproductive Behavior of Rural-Urban Migrant Women of Childbearing Age in China: Empirical Evidence from Cross-Sectional Data' (2020) 17 International Journal of Environmental Research and Public Health.

[9] Sugandha Nagpal, 'Sex-Selective Abortion in India: Exploring Institutional Dynamics and Responses' (2013) 3 McGill Sociology Review 18, 27.

[10] Amrit Dhillon, 'Selective Abortion in India Could Lead to 6.8m Fewer Girls Being Born by 2030' *The Guardian* (London, 21 August 2020) <https://www.theguardian.com/global-development/2020/aug/21/selective-abortion-in-india-could-lead-to-68m-fewer-girls-being-born-by-2030> accessed 15 December 2024.

[11] Jinkook Lee and James P. Smith, 'Fertility Behaviors in South Korea and Their Association with Ultrasound Prenatal Sex Screening' (2018) 4 SSM - Population Health 10.

[12] Tran Minh Hang, *Global Debates, Local Dilemmas: Sex-Selective Abortion in Contemporary Viet Nam* (2018).

[13] Elina Pradhan and others, 'Determinants of Imbalanced Sex Ratio at Birth in Nepal: Evidence from Secondary Analysis of a Large Hospital-Based Study and Nationally-Representative Survey Data' (2019) 9 BMJ Open.

[14] Priti Kalsi, 'Abortion Legalization, Sex Selection, and Female University Enrollment in Taiwan' (2015) 64 Economic Development and Cultural Change 163.

[15] Marc Michael and others, 'The Mystery of Missing Female Children in the Caucasus: An Analysis of Sex Ratios by Birth Order' (2013) 39 International Perspectives on Sexual and Reproductive Health 97.

[16] Sital Kalantry, 'Sex-Selective Abortion Bans: Anti-Immigration or Anti-Abortion?' (2015) 16 Georgetown Journal of International Affairs 140.

[17] Sital Kalantry, Women's Human Rights and Migration: Sex-Selective Abortion Laws in the United States and India (University of Pennsylvania Press 2017).

[18] Prenatal Non-Discrimination Act of 2012, H.R. 3541, 112th Cong. (2012).

The result of sex-selective abortions is being described as a problem of 'missing women'.[19] Some call it 'gendercide', the term coined by Mary Ann Warren in her book *Gendercide: The Implications of Sex Selection*.[20] Clearly, 'gendercide' intentionally evokes analogies with 'genocide' – one of the conducts listed as such in the Rome Statute 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[21] Warren acknowledges this parallel and writes that:

> By analogy, gendercide would be the deliberate extermination of persons of a particular sex (or gender). Other terms, such as 'gynocide' and 'femicide', have been used to refer to the wrongful killing of girls and women. Nevertheless, 'gendercide' is a sex-neutral term in that the victims may be either male or female. There is a need for such a sex-neutral term since sexually discriminatory killing is just as wrong when the victims happen to be male.[22]

Some of the reasons for giving a preference to the male offspring include patrilineal inheritance, the desire to preserve a family name, reliance on men to provide economic support for the family or to perform funeral rites, and a general tendency to reduce family size while accommodating wishes for sons.[23] In certain regions, there is a cultural necessity to 'marry off' girls, which requires a costly dowry and, therefore, families perceive their daughters primarily as a financial burden.[24] According to the UN estimations, currently, there are 140 million missing women around the world as a result of the 'son preference', including sex selection.[25]

The societal implications of a male surplus are profound. It is assumed that it may lead to men's inability to marry and increase their aggression and violence in the community.[26] A study from India suggests that a 'numerical abundance of males in the local area modestly but significantly increases the likelihood that members of Indian households are victimized by theft, breaking and entering, and assault, and also increases the probability that young women in the community are

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[19] Ewelina U Ochab, 'What Are We Doing About the Issue of Missing Women in 2021?' Forbes (8 January 2021) <https://www.forbes.com/sites/ewelinaochab/2021/01/08/what-are-we-doing-about-the-issue-of-missing-women-in-2021/?sh=24dad1927ec3> accessed 15 December 2024.

[20] Mary Anne Warren, 'Gendercide: The Implications of Sex Selection' (Rowman & Allanheld 1985).

[21] See a full definition of the crime of genocide: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Art 6.

[22] Warren (n 20) 22.

[23] UNFPA (n 4).

[24] Aparna Mitra, 'Son Preference in India: Implications for Gender Development' (2014) 48 Journal of Economic Issues 1021.

[25] United Nations Population Fund, 'Gender Biased Sex Selection' <https://www.unfpa.org/gender-biased-sex-selection> accessed 15 December 2024.

[26] Nigel Barber, 'The Sex Ratio as a Predictor of Cross-National Variation in Violent Crime' (2000) 34 Cross-Cultural Research 264.

perceived to be harassed'.[27] There is also evidence that sex selection could result in women being trafficked to other regions to be forcibly married or in sharing brides among brothers.[28] Even if the circumstances are not that drastic, additional pressure on women to get married in states with unbalanced sex ratios may still exist.[29] Furthermore, the acceptability of sex-selective abortion sends signals to the community that women are inferior to men and creates the impression that they are less worthy of being provided with adequate resources.

III. APPLICABLE LAWS AND GUIDELINES

CEDAW, adopted in 1979, does not explicitly address sex-selective abortion, which is likely to be attributed to the limited discourse on the issue at that time. One of its provisions, Article 5(a), may, nonetheless, be applicable to the ongoing debate as it states that the State Parties shall take all appropriate measures 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.[30] Additionally, the Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention) stipulates that 'the use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided'.[31]

Non-binding documents and the opinions of treaty-monitoring bodies also provide significant guidance on the issue. The Human Rights Committee – a treaty monitoring body for the International Covenant on Civil and Political Rights – in one of its General Comments noted that: '[T]he subordinate role of

[27] Scott J South, Katherine Trent and Sunita Bose, 'Skewed Sex Ratios and Criminal Victimization in India' (2014) 51 Demography 1019, 1035.

[28] Christophe Z Guilmoto, 'Characteristics of Sex Ratio Imbalance in India and Future Scenarios' (UNFPA 2007) <https://www.unfpa.org/resources/characteristics-sex-ratio-imbalance-india-and-future-scenarios accessed> 15 December 2024.

[29] S Anukriti, Maurizio Bussolo and Nistha Sinha, 'Son Preference: Why We Should Care About It' World Bank Blogs (19 October 2021) <https://blogs.worldbank.org/developmenttalk/son-preference-why-we-should-care-about-it> accessed 15 December 2024.

[30] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979) 1249 UNTS 13, Art 5(a).

[31] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 4 April 1997) ETS No 164, Art 14.

women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses'.[32] The Committee on the Rights of the Child, in its Comment on India, recommended strengthening legislation aimed at preventing sex-selective abortion.[33] Similarly, in the ICPD Programme of Action, a nonbinding but nevertheless highly important outcome document of the International Conference on Population and Development (Cairo 1994), States agreed on the need to 'eliminate all forms of discrimination against the girl child and the root causes of son preference, which result in harmful and unethical practices regarding female infanticide and prenatal sex selection'.[34]

The European Parliament in its resolution of 8 October 2013, tellingly titled, 'Gendercide: the missing women?' lamented that 'despite recent legislation against sex-selective practices, girls are to a disproportionate degree the target of ruthless sexual discrimination, often extended to include unborn, predetermined baby girl fetuses, which are aborted, abandoned or killed, for no other reason than the fact that they are female', called on the Commission and the Member States to 'identify clinics in Europe that conduct sex-selective abortions, provide statistics on this practice and elaborate a list of best practices for preventing them' and encouraged the development of 'support mechanisms for women and families that can provide information and advice to women about the dangers and damage of sex-selective practices and to provide counseling to support women who may be under pressure to eliminate female fetuses'.[35] Given the overall activity of the European Parliament, for example, its resolution in which it expressed concern about the *Dobbs* decision,[36] or condemnation of new abortion restrictions in Poland,[37] it would not be reasonable to associate the majority of this institution with the pro-life position; yet it decided to oppose sex-selective abortion in strong

[32] Human Rights Committee, 'General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10, para 3.

[33] Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention' (27 August 2013) UN Doc CRC/C/IND/3-4, paras 86, 264, 268, 275.

[34] International Conference on Population and Development, 'Report of the International Conference on Population and Development' (5–13 September 1994) UN Doc A/CONF.171/13/Rev.1, para 4.16.

[35] European Parliament, 'Resolution of 8 October 2013 on Gendercide: The Missing Women?' (2013) EP Doc P7_TA(2013)0400.

[36] European Parliament, 'Right to Safe and Legal Abortion Must Be Safeguarded, MEPs Demand' (Press Release, 9 June 2022) <https://www.europarl.europa.eu/news/en/press-room/20220603IPR32144/right-to-safe-and-legal-abortion-must-be-safeguarded-meps-demand> accessed 15 December 2024.

[37] European Parliament, 'Polish De Facto Ban on Abortion Puts Women's Lives at Risk, Says Parliament' (Press Release, 26 November 2020) <https://www.europarl.europa.eu/news/en/press-room/20201120IPR92132/polish-de-facto-ban-on-abortion-puts-women-s-lives-at-risk-says-parliament> accessed 15 December 2023.

terms. Similarly, the Committee of Ministers of the Council of Europe, in its recommendation to the Member States, urged them to 'prohibit enforced sterilization or abortion, contraception imposed by coercion or force, and pre-natal selection by sex, and take all necessary measures to this end'.[38] In the same spirit, the Council of Europe's Commissioner for Human Rights (2012-2018), Nils Muižnieks, in his comment, explicitly called for the criminalization of sex-selective abortions, adding that 'it is hard to address the problem of sex-selective abortions without being drawn into debates on abortion as such'.[39]

The United Nations Population Fund (UNFPA), in its report on 'Defying the practices that harm women and girls and undermine equality', described 'gender-biased sex selection' as a human rights violation that affects the rights to equality and non-discrimination, rights against gender stereotyping, the right to be secure in one's self, the right to be protected from violence and the right to enjoy one's health.[40] It further specified that 'a decision to carry to term male but not female fetuses is a reflection of gender discriminatory views that women and girls are worth less than men and boys'.[41] Son preference, according to UNFPA, is linked but not synonymous to gender-biased sex selection as '[P]referring to have a son rather than a daughter is not in itself a human rights violation'.[42] The report listed gender-based selection, together with child marriage and female genital mutilation (FGM), as the main forms of gender-based discrimination.[43] In the same vein, UNFPA, in its Guide Note on prenatal sex selection, declared that 'abortion for the sole purpose of sex selection and the elimination of female fetuses is not acceptable'.[44] It added, however, that 'it is essential that any new legislation or regulation does not lead to limiting access to otherwise legal abortion', recommended to 'avoid legislative limitations for late abortion in second and third trimesters', as well as 'avoid any language which assigns the rights of personhood to the fetus – thus, avoid the terms "feticide", or describing prenatal sex selection as "violence against women" (implying that the fetus is a woman)'.

[38] Council of Europe, Committee of Ministers, 'Recommendation of the Committee of Ministers to Member States on the Protection of Women Against Violence' (30 April 2002) Rec(2002)5.

[39] Nils Muižnieks, 'Human Rights Comment: Sex-Selective Abortions Are Discriminatory and Should Be Banned' Council of Europe (14 January 2014) <https://www.coe.int/en/web/commissioner/-/sex-selective-abortions-are-discriminatory-and-should-be-bann-1> accessed 15 December 2024.

[40] UNFPA, State of the World Population: Against My Will: Defying the Practices that Harm Women and Girls and Undermine Equality (30 June 2020) 33 <https://reliefweb.int/report/world/state-world-population-2020-against-my-will-defying-practices-harm-women-and-girls-and> accessed 15 December 2024.

[41] ibid 35.

[42] ibid 43.

[43] ibid 36–37.

[44] UNFPA (n 3).

It further advised not to identify sex selection itself as a human rights abuse and to 'avoid using the Beijing Conference definition of violence against women as including sex selection'.[45]

IV. ARGUMENT

My central argument presented in this Article is that sex-selective abortion can only be condemned if we deem abortion as such to be wrong. This stance arises from the understanding that the primary subject of discrimination in the case of sex-selective abortion is an actual person of concrete sex, not a potential life. If only potential life was at stake, then having a preference for one sex should not be condemned – at least not to the extent of requiring a woman to carry the burden of pregnancy she does not want for the sake of a more appropriate demographic structure or more favorable conditions in society. To explain and support this argument, I critically discuss, firstly, the position according to which abortion for the purpose of sex-selection should be banned but abortion, in general, remains acceptable, and, secondly, the position of those who claim that abortion, including sex-selective abortion, is morally permissible and should be legal.

V. TWO MAIN OPPOSITE POSITIONS

1. FIRST POSITION: ABORTION AS SUCH IS ACCEPTABLE BUT NOT SEX-SELECTIVE ABORTION

In a 2006 Zogby International Poll, 86% of Americans agreed that sex-selective abortion should be illegal.[46] Similarly, a poll by the Charlotte Lozier Institute found that 77% of respondents answered 'yes' to the question, 'When the fact that the developing baby is a girl is the sole reason for seeking an abortion, do you believe that abortion should be illegal?'[47] However, according to the latest data from the Pew Research Centre, only 37% of Americans think that abortion should

[45] ibid.

[46] Congressional Bills 114th Congress. U.S. Government Publishing Office <https://www.govinfo.gov/content/pkg/BILLS-114s48is/html/BILLS-114s48is.htm> accessed 15 December 2024.

[47] 'Poll: 77% of Americans Support Ban on Sex-Selective Abortion' Charlotte Lozier Institute (17 May 2012) <https://lozierinstitute.org/poll-77-americans-support-ban-sex-selective-abortion/> accessed 15 December 2024.

be illegal in all or most cases.[48] While public opinion surveys can have a margin of error, it is evident that many individuals who generally support abortion rights oppose sex-selective abortion. For instance, Hillary Clinton, a prominent advocate for abortion access, made an interesting comment in this regard when, in her interview for the New York Times, she stated:

> Obviously, there's work to be done in both India and China, because the infanticide rate of girl babies is still overwhelmingly high, and unfortunately with technology, parents are able to use sonograms to determine the sex of a baby, and to abort girl children simply because they'd rather have a boy.[49]

By linking infanticide to sex-selective abortion, Clinton indirectly challenged the notion of an unrestricted right to abortion on demand. She was clearly not alone in her position. Supporters of the view that abortion is generally acceptable but that sex-selective abortion is not, typically justify their stance in several ways.

> a) Sex selective abortion harms society, in particular, women, contributes to the widespread discrimination against them and, therefore, is unacceptable and possibly should be banned.

The first argument opposing sex-selective abortion but not abortion as such might be called 'an argument from discrimination'. It presupposes either at least some value of the fetus or the importance of social values that would be violated in sex-selective abortion. This position suggests that the autonomy of a woman in her abortion decision is not absolute, and for the good of a wider community, some restrictions could be justified. According to Catharine A. MacKinnon:

> (…) aborting female fetuses may further erode women's power as women make up less and less of the population. On the one hand, it is difficult to say why the reason for the abortion decision should matter until those who prescribe what matters live with the consequences the way the mother does, or until women can make such decisions in a context of equality. At the same time, in a context of mass abortions of female fetuses, the pressures on women to destroy potential female offspring are tremendous and oppressive unless restrictions exist.[50]

In the same vein, Sital Kalantry admits that:

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[48] Hannah Hartig, 'About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases' Pew Research Center (13 June 2022) <https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/> accessed 14 December 2024.

[49] Ma Mark Landler, 'A New Gender Agenda' *New York Times* (23 August 2009) <https://www.nytimes.com/2009/08/23/magazine/23clinton-t.html?_r=2&sq=hillary%20clinton&st=nyt&scp=6&pagewanted=all#> accessed 15 December 2024.

[50] Catharine A MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 Yale Law Journal 1281, 1317.

> Feminists are caught between a rock and a hard place in regard to sex selection – they want to preserve a woman's right to choose, and, at the same time, they do not want to take positions that suggest that a pre-viability fetus or embryo has a right to life.[51]

Kalantry adopts a cautious stance regarding sex-selective abortion bans, emphasizing that such prohibitions can impede general access to abortion services. She contends that restrictions may be warranted in specific contexts where evidence demonstrates that sex-selective abortion practices harm women and girls, and she highlights the adverse consequences of a male surplus. In her opinion, no general conclusions should be drawn on the basis of how sex selective abortion is practiced in other countries.[52]

Similarly, April Cherry recognizes sex-selection as an issue impacting women as a class. She acknowledges that:

> [E]ven many feminists who have argued against the legal regulation of sex-selective abortion have recognized that the principle of freedom of choice must be secondary to the principles of social fairness and equal protection if women's subordination is to be reduced or eradicated.[53]

Tabitha Powledge expresses her opposition to sex selection in even stronger terms, arguing that:

> [W]e should not choose the sexes of our children because to do so is one of the most stupendously sexist acts in which it is possible to engage. It is the original sexist sin (…) To destroy an extant fetus for this reason is more morally opprobrious than techniques aimed at conceiving a child of a particular sex but there are both deeply wrong.[54]

Thus, it can be concluded that those who believe sex-selective abortion is wrong due to its impact on the well-being of women as a group do not view abortion solely as a matter of personal choice. Instead, they recognize the broader societal implications of the practice.

> b) Women in certain cultures and circumstances are pressured to have an abortion when they discover that they are pregnant with a girl, and therefore, sex-selective abortion should be banned to avoid that pressure.

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[51] Kalantry (n 17) 51.

[52] ibid.

[53] April L Cherry, 'A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice' (1995) 10 Wisconsin Women's Law Journal 161, 217.

[54] Joni Danis, 'Sexism and "The Superfluous Female": Arguments for Regulating Pre-Implantation Sex Selection' (1995) 18 Harv Women's LJ 219, 241 (quoting Tabitha M Powledge, 'Unnatural Selection: On Choosing Children's Sex' in Helen Holmes and others (eds), *The Custom-Made Child* (Humana Press 1981) 193, 196).

Another argument could be called a 'pressure argument'. In certain cultural contexts, a woman pregnant with a girl may face familial pressure to abort in order to conceive a son. She may fear that her daughter will face harm that a son would not and worry about being ostracized by her community if she gives birth only to daughters. In extreme cases, she might be abandoned by her husband and left without financial support. These pressures can lead women to internalize societal norms that value male offspring over female, reinforcing the inferior status of girls.[55]

The idea that sex-selective abortion should be banned as a part of the strategy to combat gender stereotypes emphasizes the pedagogical or 'educative' function of law. [56] It must be noted here that the enforcement, as we can observe in China or India, which officially ban abortion on the grounds of sex but the practice nonetheless remains widespread, would be highly problematic. It is, indeed, likely that women would not reveal the real reasons for their decisions in the abortion requests.[57] The proposals to prohibit doctors from informing the parents about the sex of their child also do not appear to be the adequate solution as, firstly, communicating this information may be very subtle, even non-verbal, and, secondly, the majority of parents who would like to know whether they are expecting a boy or a girl do not want to use this knowledge for the purpose of abortion and it would not be fair to deny them this opportunity.[58] Despite these challenges, bans on sex-selective abortion are not entirely without merit due to the law's educative role in shaping societal norms. For example, in Europe, Sweden, Norway, and Iceland adopted the so-called 'Nordic model', which makes it illegal to buy sex (but not to 'sell' it). [59] The aim of this law is certainly not to identify and punish every case of buying sex but rather to create the social norm pursuant to which there are some of the most intimate acts that cannot be commodified.

Furthermore, the argument that sex-selective abortions should be banned to avoid, to the extent possible, social pressure on women to undergo them can also be supported by the claim that a woman's choice in this situation is never autonomous, as the choices she considers are necessarily restricted by systemic discrimination.[60] In that regard, the protective function of law would be in play,

[55] See Anukriti, Bussolo and Sinha (n 29).

[56] On the educative role of law, see e.g. Brian Burge-Hendrix, 'The Educative Function of Law' in Michael Freeman and Ross Harrison (eds), *Law and Philosophy* (OUP 2007) 243.

[57] See Lauren Vogel, 'Sex-Selective Abortions: No Simple Solution' (2012) 184 Canadian Medical Association Journal 286.

[58] ibid.

[59] See e.g. 'What is the Nordic Model?' (Nordic Model Now, 16 December 2023) <https://nordicmodelnow.org/what-is-the-nordic-model/> accessed 15 December 2024.

[60] Wendy Rogers, Angela Ballantyne and Heather Draper, 'Is Sex-Selective Abortion Morally Justified and Should It Be Prohibited?' (2007) 21 Bioethics 520.

and introducing abortion restriction would aim to protect a woman from making a choice that is not her own. Interestingly, however, this line of thinking does not have to be limited only to sex-selective abortions. It extends to teenagers who face family pressure to terminate their pregnancy, women indirectly (or directly) coerced by their partners to abort, or women whose employers in a subtle (or not so subtle) way let them know that they would be a burden for the company. Whether and to what extent abortion legislation can protect women from these risks is a topic for a separate discussion.

> c) Abortion is acceptable when carrying the pregnancy to term or having any child would overwhelmingly burden a woman who does not consent to that sacrifice. There is no difference between a pregnancy with a female or male fetus and little objective difference in raising a female or male child and, therefore, the preference for a particular sex cannot constitute a legitimate reason for abortion.

Finally, we might consider the 'no additional sacrifice' argument, which draws a distinction between legitimate and illegitimate reasons for abortions and, therefore, to a certain extent, it acknowledges the value of a fetus – although, in many circumstances, it does not place it above the autonomy of a woman. One of the core arguments in favor of abortion is that even a significant value of the fetus' life cannot prevail over the autonomy of a woman who should not be compelled to make sacrifices and carry the burdens of pregnancy she does not desire. In *Roe v Wade,* the majority of the United States Supreme Court stated:

> [S]pecific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[61]

The burdens described by the Court in *Roe v Wade* apply equally to pregnancies regardless of the fetus's sex, just as they apply to pregnancies irrespective of the child's race. As Dr. Puneet Bedi, who himself performs early abortions and abortions for medical reasons, states: '[Y]ou can choose whether to be a parent. But once you choose to be a parent, you cannot choose whether it's a boy or girl, black or white, tall or short'.[62] Thus, the only case that would be substantially

[61] *Roe v Wade*, 410 US 113, 153 (1973).

[62] Mara Hvistendahl, *Unnatural Selection: Choosing Boys over Girls, and the Consequences of a World Full of Men* (PublicAffairs 2011) 46.

different is being pregnant with a child with a serious illness or disability, described in greater detail in the subsequent section of the Article.

2. SECOND POSITION: ABORTION IS ACCEPTABLE, INCLUDING SEX-SELECTIVE ABORTION

Proponents of this position most often motivate it by claiming that bans on sex-selective abortion will lead to a 'slippery slope' scenario and endanger access to abortion as such.[63] They also express concern that bans on sex-selective abortions 'are part of a hidden agenda by anti-choice groups'.[64] While some may personally believe that sex-selective abortion is morally wrong, they prioritize upholding the principle of complete autonomy for women and prefer to allow the practice rather than risk compromising this principle. Thus, we can observe attempts to find a way to express condemnation of gender discrimination without opposing sex-selective abortions although they have been repeatedly recognized to be an instance of such discrimination.[65] In adopting this approach, proponents typically invoke the following arguments.

a) Abortion is, first and foremost, a personal choice that affects the life of a concrete woman. It is unacceptable to require a sacrifice pertaining to such a personal sphere for the good of society or even the good of all women as a group.

According to this perspective, all abortions fall within the category of private choices, and even though some members of society will consider sex-selective abortions to be harmful to the concept of equality, they should not be prohibited. Sital Kalantry draws an analogy between sex-selective abortion and a situation in which a man refuses to talk with a woman because of her perceived inferiority. She agrees that such behavior is a manifestation of gender discrimination but she does not see a possibility of any legal intervention here.[66] In the same vein, Sherry Colb and Michael Dorf argue that if a racist person does not want to have sex with

[63] See e.g. Anne O'Rourke, 'A Legal Political Assessment of Challenges to Abortion Laws by Anti-Choice Activists in Australia and the Progression of Abortion Law in Australia and the United States' (2022) 70 Am J Comp L 162.

[64] Center for Reproductive Rights, *Statement of Policies and Principles on Discrimination against Women and Sex-Selective Abortion Bans* <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Statement%20on%20Sex%20Selective%20Abortion%20Bans%20FIN_1.pdf> accessed 15 December 2024.

[65] See e.g. Amnesty International, 'Amnesty International's Updated Abortion Policy: FAQs' (28 September 2020) <https://www.amnesty.org/en/latest/news/2020/09/amnesty-updated-abortion-policy-faqs/> accessed 15 December 2024.

[66] Kalantry (n 17) 63.

another individual because of their race, this is immoral and offensive but not illegal, nor should it be.[67]

This line of reasoning, while deeply individualistic, is not surprising in the contemporary world. The notion of shaping one's life and making intimate choices for the common good of the community seems to be a relic of the past for much of society. Even though many developed countries are facing demographic crises, it is rare to find anyone who would tell a specific woman that she should have a child to help alleviate this issue.

> b) Women who experience the pressure of having a son will be additionally burdened if they are deprived of the possibility to resort to legal sex- selective abortion.

Interestingly, some commentators, despite recognizing the pressure on women to undergo sex-selective abortion, argue that this pressure is not a reason to ban the practice but rather a reason to permit it. For instance, Johanna Westeson, Regional Director for Europe of the Center for Reproductive Rights, recalling situations in which women are punished if they give birth to girls, states that in this context, abortion is rational.[68] Kate Greasley goes even further, suggesting that when the pressure is severe enough to jeopardize a woman's mental health, sex-selective abortion could fall within the health exception.[69] She implies that sex-selective abortion in this way may be legal in the United Kingdom under the terms of the Abortion Act 1967, according to which no criminal liability shall attach to 'someone performing an abortion where two doctors form an opinion in good faith that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman'.[70] Sally Sheldon provides a similar perspective, illustrating the point with the following example:

> Imagine a woman with two female children who comes from an ethnic group which places a very high value on sons. She and her husband live with her in-laws, who threaten to throw them out if she gives birth to another daughter. Imagine another whose husband beats her and tells her that she will be subject to far worse violence if she gives birth to a daughter. In each of these situations, we would wish for the

[67] Sherry F Colb and Michael C Dorf, *Beating Hearts: Abortion and Animal Rights* (Columbia University Press 2016) 88.

[68] Johanna Westeson, 'Rights-Based Approach to Sex-Selection' (Center for Reproductive Rights, 23 January 2012) <https://reproductiverights.org/intlawgrrls-rights-based-approach-to-sex-selection/> accessed 15 December 2024. ('We're all outraged by the practice, but without much knowledge, it's easy to call for its prohibition. In reality, there are many circumstances in which women are severely punished if they give birth to girls, and in that context, an abortion is rational'.)

[69] Kate Greasley, 'Is Sex-Selective Abortion against the Law?' (2016) 36 Oxford J Legal Stud 535.

[70] ibid 539.

> woman to be able to leave an abusive situation or, better, to live in a world where such things do not happen. But while we wait for that world, a doctor who authorizes a termination in such circumstances could make a strong legal case that she had acted in good faith to preserve the mental health of her patient.[71]

Given the definition of health adopted in *Doe v Bolton* in which the U.S. Supreme Court stated that when it comes to health 'the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient', it would not be impossible to imagine a similar argument developed in the United States before the *Dobbs* decision.[72] Even independently from its relation to mental health, it is undeniable that the pressure on women to undergo sex-selective abortions exists, and that fact prompts some to argue that only a woman can decide if she is able to bear this pressure or if she chooses to avoid it resorting to abortion.

> c) Only a concrete woman can decide what is a legitimate reason for her to have an abortion, and the difference in burdens cannot be evaluated externally.

Although *prima facie* choosing abortion because the fetus is of the unwanted sex demonstrates the conviction that one sex is better than the other, one could imagine the situation when these two do not have to be equivalent. For instance, a woman may desire to have a son when she already has a daughter or daughters to balance her family or she may have past traumas associated with one sex. If we accept the view that a fetus is not a person (does not have any rights) and, therefore, the autonomy of a woman should always prevail, then even abortion chosen for most 'trivial' reasons should not be banned.

Moreover, it could be argued that any requirement to provide reasons for one's abortion is demeaning as it requires sharing intimate details of one's life with strangers. If one opposes any restrictions such as parental consent, spousal notification, or waiting periods on the grounds that they undermine a woman's moral agency, then it follows that a woman should be the sole arbiter of her pregnancy decisions. April Cherry argues that:

> (…) the refusal of society, through law, to protect and support women's ability to make and carry out reproductive decisions, including a decision to abort a fetus because of its sex, also seems to derive from the deontological ethical consequences of the view that a fetus is a person, which equates the moral status of the fetus with the moral status of the pregnant woman.[73]

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[71] Sally Sheldon, 'Abortion for Reason of Sex: Correcting Some Basic Misunderstandings of the Law' (2016) 37 Abortion Review 2 <https://kar.kent.ac.uk/29453/1/AR_issue_37.pdf> accessed 15 December 2024.

[72] *Doe v Bolton*, 410 U.S. 179, 192.

[73] Cherry (n 53) 209.

This position does not necessarily assert the absence of any moral significance of the fetus but rather contends that he or she lacks independent rights. In contrast, a woman possesses established rights, and thus, her autonomy takes precedence over concerns regarding potential harm to the child.[74]

VI. A RESPONSE TO BOTH POSITIONS AND THEIR SUPPORTING ARGUMENTS

A response to both positions – the one rejecting sex-selective abortion but not abortion in general and the one accepting abortion, including sex-selective abortion – as well as their supporting arguments – is provided primarily from the perspective of consistency.

Argument 1.1 presupposes either some intrinsic value of the fetus or the significance of societal values that would be undermined by sex-selective abortion. It suggests that a woman's autonomy in her abortion choice is not absolute and that some restrictions could be justified for the greater good of the wider community. This position appears reasonable only if the fetus is considered a life with inherent value, not merely a potential being. Otherwise, it would be unjust to expect a woman to forgo an abortion and endure the burdens of pregnancy and childbirth solely to prevent potential negative effects on others – such as a more sexist and patriarchal society, increased violence, or a demographic imbalance affecting men's ability to find female partners. If the value of the fetus is to be disregarded, then argument 2.1 appears more persuasive, as it acknowledges the unacceptability of requiring a woman to make such a significant personal sacrifice.

Arguments 1.2 and 2.2, in discussing the problem of pressure on women, reach two opposite conclusions – one of them perceives it as a reason to ban sex-selective abortions and the other as a reason not to do it. *Prima facie,* both of them seem to ignore the question of the fetus and focus only on the well-being of a woman. Argument 1.2 highlights the pedagogical and educative role of law in shaping culture and protecting the vulnerable, akin to the Nordic model that prohibits the sale of sex to discourage prostitution. This approach, however, makes sense only if the issue at hand is not morally neutral – lawmakers under the Nordic model do not see prostitution as such. Law, in general, is primarily concerned with the pressure to do things that are considered bad or immoral. The proposition included in argument 2.2, on the other hand, seems to ignore not only a fetus but also to abandon the woman's interest, including the right to make

[74] ibid 210.

autonomous decisions about her pregnancy. The reasoning that social preference for boys is so entrenched that abortion access should serve as an immediate remedy is surprising, especially when compared to responses to female genital mutilation (FGM), which the UNFPA lists as another form of gender discrimination.[75] Like sex selection, FGM is rooted in harmful gender stereotypes, and non-conformity can lead to social pressure, exclusion, or even violence. Nonetheless, few commentators would argue that such social pressures justify not prohibiting FGM.

Finally, the deepest contrast lies between arguments 1.3 and 2.3. Argument 1.3 differentiates between legitimate and illegitimate reasons for abortion, thereby implicitly acknowledging the value of the fetus, even if it does not always place this value above a woman's autonomy. In contrast, argument 2.3 affords a woman practically unrestricted autonomy, prioritizing her will over the welfare of the fetus in nearly all circumstances – though, as argument 1.2 points out, the nature of this will and autonomy is debatable. To critically evaluate these positions, it is essential to acknowledge that abortion constitutes an act intrinsically related to the fetus, whose status or rights, or lack thereof, cannot be ignored. While argument 1.3 appears more aligned with majority opinion, recognizing some value in the fetus, argument 2.3 arguably prevails in terms of consistency. The merits of these positions are further examined in the subsequent section of this Article, which delves into the concept of fetuses as potential or actual persons.

VII. THE ANALOGY BETWEEN SEX-SELECTIVE ABORTION AND ABORTION ON THE BASIS OF DISABILITY

A noteworthy analogy may be developed between abortion on the basis of sex and abortion on the basis of disability if we assume, for the sake of argument, that a woman desires to be pregnant but not with a child with certain characteristics. Both types of abortion are possible due to the advances in technology and the ability to recognize disability or sex before a baby is born. Jeremy Williams argues that if one is committed to a pro-choice stance with regard to selective abortion due to disability, he would be unable to justify the prohibition of sex-selective abortion, and further asks about the scope of a woman's right to choose when it comes to the use of abortion as a means of selecting against unwanted fetal traits.[76] Williams acknowledges that opponents of sex-selective abortion might advocate for additional restrictions on abortions on the basis of disability, but he

[75] See *An Interagency Statement* (n 4).

[76] Jeremy Williams, 'Sex-Selective Abortion: A Matter of Choice' (2011) 31 Legal Philosophy 125.

firmly asserts that 'any such new restrictions would be unacceptably onerous for women'.[77]

Considering the sex-disability analogy, opponents of sex-selective abortion argue that it prevents the birth of females, thereby impeding progress toward gender equality. Similarly, some disability rights advocates contend that abortion based on disability eliminates individuals who could champion the rights of people with similar conditions, leading to unequal treatment.[78] When the presence of women or persons with disabilities is reduced in a given environment their distinctive needs may start to be ignored and the resources are not allocated to meet them.[79] Additionally, women may face pressure from others, particularly their partners, to undergo an abortion if the fetus is of an undesired sex or has a disability. In certain cultural contexts, women could fear that their daughters will face greater disadvantages compared to their sons, much like they might worry that their disabled children will encounter more significant challenges than healthy ones.

Interestingly, public opinion varies significantly in its judgment of these two kinds of abortion. Most people would consider sex-selective abortion to be less acceptable than abortion in general[80] and abortion on the grounds of disability more acceptable than abortion in more typical circumstances.[81] This likely stems from the perception that raising a child with a disability presents a greater burden for parents compared to raising a child of an undesired sex, which is generally not seen as particularly burdensome. Perhaps, the fact that knowing the sex of the fetus makes it easier for us to identify with him or her and develop an emotional bond is also of significance. Nevertheless, one may imagine that in a specific cultural context, raising only girls would be more difficult than having a child with Down syndrome in another environment. Similarly, the disadvantages girl-child would suffer could be greater than the obstacles individuals with Down syndrome face, especially in light of the data according to which they are generally satisfied with their lives.[82]

Reflecting on the issue of motivation for abortion from another perspective and the reason why sex-selective abortion is widely opposed, perhaps it would be useful to make a comparison with aggravated homicide, that is, homicide

[77] ibid 128.

[78] ibid 127.

[79] See e.g. Christopher Gyngell and Thomas Douglas, 'Selecting against Disability: The Liberal Eugenic Challenge and the Argument from Cognitive Diversity' (2018) 35 Journal of Applied Philosphy 319.

[80] See supra n. 46, 47, 48.

[81] See Sally Sheldon and Stephen Wilkinson, 'Termination of Pregnancy for Reason of Foetal Disability: Are There Grounds for a Special Exception in Law?' (2001) 9 Med L Rev 85.

[82] Brian G Skotko, Susan P Levine and Richard Goldstein, 'Self-Perceptions from People with Down Syndrome' (2011) 155A(10) American Journal of Medical Genetics Part A 2360.

motivated by, for example, sexism, racism or homophobia. Although to a victim, this distinction would make little difference, the lawmakers could additionally condemn the motivation in criminal statutes.[83] Needless to say, if this analogy is supposed to make sense, it would be necessary to classify abortion as a wrongful act, even amounting to homicide. Moreover, this reasoning could be extended to the case of abortion based on disability – if targeting someone because of their sex is unacceptable, it should also be unacceptable because of one's state of health.

To render this comparison reasonable, a fetus must be likened to an already-born human being, such as an infant who is legally protected. Kate Greasley states that 'no doubt, a practice of selectively terminating Down's Syndrome human beings post-birth would be regarded as horrifyingly barbaric'.[84] Indeed, the vast majority of the general public would probably agree with her. Nonetheless, some scholars argue that infants, like fetuses, are not actual persons and, thus, killing them should be permissible.[85] For them, the most relevant factor is not the intrinsic value of a child but whether he or she is wanted by the parents or, possibly, other members of society who would be potentially willing to assume care responsibilities which becomes more difficult for children with disabilities. This debate, therefore, eventually centers on whether a fetus or infant possesses the right to life by virtue of their humanity alone or whether they must meet additional criteria for personhood.

VIII. ACTUAL OR POTENTIAL PERSONS? DOES PERSONHOOD MATTER?

At the outset, it must be said that if sex-selective abortion constitutes a form of discrimination against women, it is necessary to ask who is the primary object of this discrimination, as it is only possible to discriminate against persons. In the words of Christopher Kaczor 'to discriminate between non-persons, for example, plucking the red roses, but leaving the white, is not ethically problematic in itself, since these plants do not have rights nor do they merit equal respect as persons'.[86] He continues stating that 'some arguments against SSA (sex-selective abortion)

[83] Kate Greasley, *Arguments about Abortion: Personhood, Morality, and Law* (OUP 2017) 223–244.

[84] ibid 229.

[85] See e.g. Alberto Giubilini and Francesca Minerva, 'After-Birth Abortion: Why Should the Baby Live?' (2012) 39 Journal of Medical Ethics 261.

[86] Christopher Kaczor, *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice* (Routledge 2011) 195.

only make sense on the implicit assumption that the human fetus is a person with rights, but this premise renders problematic not just SSA but abortion generally'.[87]

In this context, Mary Anne Warren famously distinguishes five criteria for personhood: 1. consciousness (of objects and events external and/or internal to the being), and in particular the capacity to feel pain; 2. reasoning (the developed capacity to solve new and relatively complex problems); 3. self-motivated activity (activity which is relatively independent of either genetic or direct external control); 4. the capacity to communicate, by whatever means, messages of an indefinite variety of types; 5. the presence of self-concepts, and self-awareness, either individual or racial, or both.[88] We may notice that newborns, just like fetuses, probably lack these characteristics. Peter Singer agrees and proposes that in order to be a person, an individual shall develop rationality, autonomy, and self-consciousness, and, therefore, killing a newborn would not be equivalent to killing a rational, autonomous, and conscious adult.[89]

According to Warren, even though fetuses are biologically human and belong to the human species, they do not possess moral rights as one needs to have the capacity for sentience to possess them and they lack it, at least in the early stages of their development.[90] Therefore, since a woman, unlike a fetus, has moral rights, including the right to defend her physical integrity, her abortion 'does not require any special justification, such as financial hardship or the risk of damage to the woman's mental or physical health'.[91] Addressing the late abortion and infanticide Warren admits that, at some point, a fetus begins to develop 'some capacity for sentience' but according to her 'even a sentient fetus is not a person' because it does not yet have a capacity for reason, self-awareness or other mental capacities.[92] She notes that 'the mental capacities of fetuses are certainly not more sophisticated than those of newborn infants', although she tries to take a cautious position on infanticide, saying that infants may be treated 'as having the same basic moral rights as the rest of us, as long as this can be done without violating the basic moral rights of persons'.[93] The good reason for such a treatment may be empathy and affection for babies (one's subjective feelings) or their potentiality to become

[87] ibid 198.

[88] Mary Anne Warren, 'On the Moral and Legal Status of Abortion' (1973) 57 Monist 43.

[89] Peter Singer, *Practical Ethics* (3rd edn, CUP 2011) 160. ('In Chapter 4, we saw that the fact that a being is a human being, in the sense of a member of the species Homo sapiens, is not relevant to the wrongness of killing it; instead, characteristics like rationality, autonomy and self-awareness make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings or any other self-aware beings'.)

[90] Warren (n 20) 92–94.

[91] ibid 96.

[92] ibid 97–98.

[93] ibid 100–101.

a person, but 'in the absence of decent foster care for infants whose parents cannot care for them, the prohibition of infanticide causes more harm than good'.[94] Hence, for Warren, 'early sex-selective abortion is morally no more problematic than preconceptive sex-selection' and 'sex-selective late abortion is an instance of gendercide, even though it is not an instance of murder'.[95] She appears to struggle with articulating the position that sex-selective abortion is intrinsically sexist and that sexism must be unequivocally condemned, without asserting that abortion, at least under certain circumstances, is morally objectionable and potentially warranting prohibition.[96]

In the first place, however, it does not appear right to separate the morality of abortion itself from the morality of sex-selective abortion because, in all the considerations related to the procedure, the moral status of the fetus must be of the uttermost importance. Indeed, the term 'termination of pregnancy' is sometimes used as a synonym to 'abortion', but there are also some cases in which, even though technically pregnancy has been terminated, abortion is still considered 'failed' if a fetus is born alive, particularly at the later stages of pregnancy.[97] Hence, he or she always remains the primary object of action. As mentioned earlier, if a fetus is not a separate being with his or her own rights, including the fundamental right to life, then it is not reasonable to argue that a woman should be morally obliged to shape her family in a way that would be beneficial for a larger community, even women as a group, especially if this requires from her a significant sacrifice of continuing pregnancy she does not desire. Therefore, the discussion on fetal personhood and the extent to which it conditions the right to life of a fetus remains crucial.

All of us have periods of time in our lives when we do not fulfill Warren's criteria of personhood (consciousness, reasoning, self-motivated activity, the capacity to communicate, the presence of self-concepts and self-awareness) – for example, when we sleep, are under anesthetic or, in more extreme circumstances,

[94] ibid 104–105.

[95] ibid.

[96] ibid 88.

[97] See e.g. Adam Eley and Jo Adnitt, 'The Failed Abortion Survivor Whose Mum Thought She Was Dead' (BBC, 5 June 2018) <https://www.bbc.com/news/health44357373>; Derek Scally, 'German Man Who Survived Abortion Dies Aged 21' (The Irish Times, 9 January 2019) <https://www.irishtimes.com/news/world/europe/german-man-who-survived-abortion-dies-aged-21-1.3752247>; Testimony of Gianna Jessen, 'Surviving a Failed Abortion When She Was a Baby' (Committee on the Judiciary, House of Representatives, 9 September 2015) U.S. Government Publishing Office https://www.govinfo.gov/content/pkg/CHRG-114hhrg96052/html/CHRG-114hhrg96052.htm all accessed 15 December 2024; Testimony of Gianna Jessen, 'Surviving a Failed Abortion When She Was a Baby' (Committee on the Judiciary, House of Representatives, 9 September 2015) U.S. Government Publishing Office <https://www.govinfo.gov/content/pkg/CHRG-114hhrg96052/html/CHRG-114hhrg96052.htm> all accessed 15 December 2024.

in a coma. Except for severe cases of coma, these situations are temporary, and the passage of time is sufficient for individuals to regain 'full personhood'. Time is also precisely what a fetus needs to develop his or her capacities. One may argue that the crucial factor distinguishing a person who temporarily lacks consciousness from a fetus is that the former has already been conscious, which never occurred to the latter. Stephen Schwartz and Ronald Tacelli offer a noteworthy response to that claim.

> Imagine the case of two children. One is born comatose, and she will remain so until the age of twelve. The other seems healthy at birth, but as soon as she comes briefly to possess the concept of a continuing self, she, too lapses into a coma from which she will not emerge until the age of twelve. Can anyone seriously hold that the second child is a person with a right to life, but the first child not? In one case, that moment of self-awareness will come only after twelve years have elapsed. In the other, it will return. In both, it will grow and develop. Picture the two of them lying side by side. Almost twelve years have passed. Would it not be absurd to say that only one of these two children lying unconscious there before you is a person? That there is some essential difference between them?[98]

This illustration underscores that conditioning one's dignity and value on his capacities does not appear morally acceptable. Neither does conditioning them on the feelings and attitudes of the others, as Warren does, distinguishing between those who are wanted and 'unwanted'. If human dignity is intrinsic, such a distinction contradicts that principle. Moreover, circumstances can change, and those who were once wanted and cherished can easily become 'unwanted'. Should their value then diminish? Consider an adult who has no one to mourn their passing. If that person were killed in their sleep and, assuming there is nothing after death, never realized what had happened, could such a killing be deemed morally neutral since no 'actual person' would suffer as a result? Few criminal courts would accept this line of reasoning.

Being human, in the words of Calum Miller, is an 'all or nothing affair' as one may be stronger or weaker, taller or smaller, more or less intelligent but it would be difficult to declare that one is more human than another.[99] Analyzing the criteria of personhood, it is unclear in what way they should be measured and whether the right to life may come in degrees – for example, whether someone who fulfills four of these criteria but lacks the capacity to communicate has a lesser right to life

[98] Stephen D Schwarz and Ronald K Tacelli, 'Abortion and Some Philosophers: A Critical Examination' (1989) 3 Public Affairs Quarterly 81, 89.

[99] Calum Miller, 'Human Equality Arguments against Abortion' (2023) 49 J Med Ethics 717. See also Article 1 of the Universal Declaration on the Human Genome and Human Rights (11 November 1997) ('The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity').

than someone who fulfills all five, or whether an individual with a better ability to reason should have his right to life protected to a greater extent. Their fulfillment also varies depending on the specific circumstances in which one finds himself, most commonly his age and state of health. Furthermore, the fact that these criteria are developed by those who hold more power – academically, intellectually or politically – than most of the population to whom they apply raises additional concerns about their arbitrariness. An average person does not reflect too much on the rational capacities of an infant or the level of his self-awareness but rather accepts them as typical for that age and is mostly preoccupied with satisfying his basic **biological and human needs** by feeding and nurturing him.

It is, indeed, true that although most of the domestic legal systems provide certain protections for the fetus, it is rare to establish them on the level equal to the protection of those already born. Notably, however, international human rights law does not distinguish between protection for those who are 'persons' and those who are 'human beings' and, instead, operates with terms such as 'everyone', 'person', and 'all human beings' interchangeably.[100] The Universal Declaration of Human Rights, adopted as a response to the atrocities of World War II, speaks about 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'.[101] Also, the International Covenant on Civil and Political Rights states that every **human being** has the inherent right to life.[102] Conditioning the right to life on the ability to meet – rather arbitrary – criteria for personhood could be particularly risky in light of the unique nature of that right.[103] It may be described as a 'right to existence' and, thus, denying it equals the denial of all other rights. On the other hand, the possible restrictions on autonomy do not lead to similarly radical consequences.

Finally, it is crucial to discuss the consequences of the assertion that the primary objects of discrimination in sex-selective abortion are unborn females from the perspective of international anti-discrimination law. The Inter-American Court of Human Rights repeatedly affirmed that non-discrimination obligation in

[100] See, e.g., International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

[101] G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* (10 December 1948).

[102] International Covenant on Civil and Political Rights 999 UNTS 171 (16 December 1966), Art 6. Emphasis added.

[103] Tellingly, genetic and biological humanity can be established by purely scientific means. 'Personhood', on the other hand, requires justifying its criteria with underlying ideology.

international law entered the realm of jus cogens.[104] If we were to agree that the primary object of discrimination in sex-selective abortion is an unborn female child, then states would have to prohibit it as non-discrimination constitutes an obligation of immediate effect.[105] Moreover, they would have to grant protection to the unborn human beings without introducing additional criteria of personhood – as a natural consequence of the fact that if an individual is worthy of protection from discrimination, he or she must also be worthy of protection from his or her violation of the right to life.

IX. CONCLUSION

In the analysis of the problem of sex-selective abortions and arguments in favor and against its prohibition, those opposing the bans appear to be more consistent – but only if we deny the inherent value and dignity to fetuses in general. Paradoxically, in the contemporary abortion debate, the question about **their** status is often overlooked. The main way to deny them this value is to claim that only **persons**, as opposed to genetically and biologically human beings, possess it and to establish the criteria of personhood that they do not fulfill. This, however, as discussed in the Article, comes with serious consequences for the most vulnerable groups of people and does not find support in international human rights law. Hence, if the presumptions that a) sex-selective abortion constitutes gender discrimination, b) the primary object of abortion is the fetus whose fate is directly at stake,[106] c) it is only possible to discriminate against human beings who have inherent worth and dignity – are true, then abortion in general should be deemed unacceptable.

[104] Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion OC-18/03, Inter-American Court of Human Rights, 17 September 2003), para 103. *Atala Riffo and Daughters v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 239 (24 February 2012) para 79. Jus cogens is defined as 'a rule or principle in international law that is so fundamental that it binds all states and does not allow any exceptions'. 'Jus cogens', *Oxford Reference* (9 March 2004) <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100027487> accessed 15 December 2024.

[105] See e.g. CESCR, 'General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (Art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20 para 7.

[106] There is no substantial difference between the burden of pregnancy with a boy or a girl for a woman who is pregnant, so it cannot be said that her interests are at stake analogously to other abortion situations. It does not mean, of course, that her good and well-being can in any way be ignored in decision-making on this issue.

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RECEPTIVENESS OF THE CONSTITUTIONAL COURT OF COLOMBIA TO UNFAVOURABLE INTERNATIONAL JUDICIAL DECISIONS

Abstract

While Colombia's political authorities considered the unfavourable maritime delimitation decision by the International Court of Justice in the *Territorial and Maritime Dispute* case to be unconstitutional, the Constitutional Court of Colombia declined to declare it contrary to the Constitution. The reasoning appears to be indirectly based on the distinction between obligations of result and obligations of means, it also highlights the absurdity of the traditional dichotomy between monism and dualism. Contrary to similar proceedings in Italy, Russia, and Poland, the Constitutional Court demonstrated its receptiveness to international law.

KEYWORDS

Constitutional Court of Colombia, International Court of Justice, obligations of result, obligations of means, monism, dualism

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I. INTRODUCTORY REMARKS

International judicial decisions are often subject to proceedings before national courts of the decision-debtor. (Un)famous are cases in which the highest national courts (either directly or indirectly) rejected their enforceability.[1] As Judge Iwasawa points out, that scenario undermines the prestige of international courts and places a State in a difficult position regarding the implementation of an international decision.[2]

A specific sub-category involves cases that are initiated before the highest national courts solely to undermine an international decision. These are politically misperceived as providing a sufficient basis for State organs to disregard international decisions they consider unfavourable.

A similar attempt occurred in Colombia following the disadvantageous maritime delimitation by the International Court of Justice (ICJ) in the *Territorial and Maritime Dispute* case.[3] The Constitutional Court, contrary to the expectations of local politicians, declined to undermine the judgment of the ICJ.[4] Although this already makes the decision significant, it did not attract international attention.[5] It was neither reported in the *International Law Reports* nor in the *International Legal Materials*. The aim of this short study is to address this lamentable gap.

II. *TERRITORIAL AND MARITIME DISPUTE* CASE AND ITS POLITICAL AFTERMATH

Nicaragua initiated proceedings against Colombia concerning sovereignty over the San Andrés Archipelago and the maritime boundary in the Caribbean

[1] The most widely known example is probably the judgment of the Supreme Court of the United States in *Medellín v Texas* 552 US 491 (2008). It was the follow-up to *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12. As regards the Court of Justice of the European Union, one might point to, for example, Case Pl ÚS 5/12 31 January 2012 Constitutional Court of the Czech Republic (Ústavní soud České republiky); and Joined Cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 5 May 2020 Second Senate of the Federal Constitutional Court (Bundesverfassungsgericht) ECLI:DE:BVerfG:2020:rs202005052bvr085915.

[2] Yūji Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (Brill Nijhoff 2022) 255.

[3] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624.

[4] Case C-269/14 12 May 2014 Constitutional Court of Colombia (Corte Constitucional de Colombia).

[5] It was only discussed in a single article, and rather critically, due to the arguments used by the Constitutional Court. See Andrés Sarmiento Lamus, 'Impacto e implementación en Colombia de la decisión de fondo de la Corte Internacional de Justicia en el *diferendo territorial y marítimo (Nicaragua c. Colombia)*' (2016) XVI Anuario Mexicano de Derecho Internacional 401.

Sea. The central issue in the dispute was the interpretation of the 1928 Esguerra-Bárcenas Treaty and its 1930 Protocol.[6] The Treaty recognised Colombia's sovereignty over certain islands in the Archipelago, that is, San Andrés, Providencia, and Santa Catalina. Under the 1930 Protocol, the western boundary of the Archipelago was not to extend beyond the 82nd meridian. For Colombia, this marked the proper maritime border with Nicaragua, whereas for Nicaragua, it was merely a demarcation of the Archipelago's territorial limits.

Nicaragua sought to found the jurisdiction of the ICJ on the basis of Article XXXI of the Pact of Bogotá.[7] At the preliminary objection stage, the ICJ ruled that the issue of sovereignty over San Andrés, Providencia, and Santa Catalina fell outside its jurisdiction.[8] This was because of Article VI of the Pact of Bogotá, which excludes from judicial settlement disputes that have already been settled by the parties.[9]

In the Judgment on the merits, the ICJ found that Colombia had sovereignty over all other islands of the Archipelago.[10] It also rejected Nicaragua's request to delimit its continental shelf beyond 200 nautical miles.[11] With regard to the maritime delimitation, although the boundary was found to largely follow the 82nd meridian along the Archipelago, the majority of it was determined to be perpendicular to the limits of Nicaragua's continental shelf.[12] As a result, Colombia 'lost' the portion of the Caribbean Sea it had claimed as its own, and the Archipelago was thus 'surrounded' by Nicaragua's exclusive economic zone.

While celebrating sovereignty over the Archipelago, the President of Colombia believed that the maritime delimitation restricted Colombia's navigational rights and violated the Constitution.[13] He pledged to protect the State's interests, the first step of which was Colombia's withdrawal from the Pact of Bogotá.[14] The Colom-

[6] For excerpts from these texts, see *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Preliminary Objections) [2007] ICJ Rep 832.

[7] American Treaty on Pacific Settlement (signed 30 April 1948, entered into force 6 May 1949) 30 UNTS 84.

[8] *Territorial and Maritime Dispute* (Preliminary Objections) (n 6) 860–1 paras 85–90.

[9] 'The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty'. For more information on the jurisdiction of the ICJ based on the Pact of Bogotá, see María Teresa Infante Caffi, 'The Pact of Bogota: Cases and Practice' (2017) 10 Anuario Colombiano de Derecho Internacional 85.

[10] *Territorial and Maritime Dispute* (Merits) (n 3) 641–62 paras 25–103.

[11] (n 3) 668–70 paras 125–131.

[12] (n 3) 673–717 paras 137–247.

[13] 'Alocución del Presidente Juan Manuel Santos sobre el fallo de la Corte Internacional de Justicia' (*Cancillería de Colombia*, 19 November 2012).

[14] 'Declaración de la Canciller Holguín frente al fallo proferido por la Corte Internacional de Justicia' (*Cancillería de Colombia*, 28 November 2012).

bian Minister of Foreign Affairs was summoned by parliamentary committees to explain the litigation strategy before the ICJ.[15] In one of the interviews, she stated that Colombia did not accept the Judgment and intended to analyse it in depth.[16] Two former Colombian ministers also raised concerns about a potential conflict of interest involving Judge Xue, of Chinese nationality, due to the Chinese-led construction of an interoceanic canal in Nicaragua.[17] However, they did not substantiate their allegations in any way,[18] and fortunately, the Colombian government distanced itself from them.[19] Finally, the President of Colombia announced the official response strategy to the Judgment, which included challenging it before the Constitutional Court.[20]

In the meantime, Nicaragua initiated two new proceedings against Colombia before the ICJ. In the first case, it accused Colombia of failing to comply with the Judgment in the *Territorial and Maritime Dispute* case. In this regard, the ICJ ruled that there were breaches by both Colombia and Nicaragua.[21] In the second case, Nicaragua sought the delimitation of its continental shelf extending beyond 200 nautical miles, an issue which had not been settled in the first proceedings. All of Nicaragua's claims in these proceedings were, however, dismissed.[22]

III. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT OF COLOMBIA

The Constitutional Court was seized by the President of Colombia and, independently, by several citizens. As Colombia is a dualist State, the purpose of the

[15] 'La Canciller Holguín explicó las acciones de Colombia frente al fallo de la CIJ en la Comisión Segunda de la Cámara y plenarias del Senado y la Cámara de Representantes' (*Cancillería de Colombia*, 22 November 2012).

[16] '"Nosotros no hemos acatado el fallo. Lo que hemos dicho es que queremos estudiar el fallo a profundidad", dijo Canciller Holguín en diálogo con CNN' (*Cancillería de Colombia*, 23 November 2012).

[17] Noemí Sanín Posada and Miguel Ceballos Arévalo, 'El fallo de La Haya: ¿Triunfo de Nicaragua o cuento chino?' (*Semana*, 27 March 2013).

[18] Sarmiento Lamus (n 5) 409.

[19] For some aftermath, see 'Noemí Sanín renunció a la Comisión de Relaciones Exteriores de Colombia' (*El País*, 29 July 2013).

[20] 'Alocución del Presidente de la República, Juan Manuel Santos, sobre la Estrategia Integral de Colombia frente al Fallo de la Corte Internacional de Justicia de La Haya' (*Cancillería de Colombia*, 9 September 2013). For some commentary, see Sarmiento Lamus (n 5) 409–12.

[21] See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Merits) [2022] ICJ Rep 266.

[22] See *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Judgment) [2023] ICJ Rep 413.

proceedings was to challenge the national law expressing consent to be bound by the Pact of Bogotá. It was argued that the Judgment in the *Territorial and Maritime Dispute* case should be unenforceable in Colombia because the ICJ did not have jurisdiction over the matter. Furthermore, it was alleged that the contested decision unconstitutionally altered the borders, which are fixed by Article 101 of the Constitution:

> The borders of Colombia are those established in international treaties approved by Congress and duly ratified by the President of the Republic, and those defined by arbitration awards in which Colombia takes part.
>
> The borders identified in the form provided for by this Constitution may be modified only by treaties approved by Congress and duly ratified by the President of the Republic.
>
> Besides the continental territory, the archipelago of San Andrés, Providencia, and Santa Catalina, and the island of Malpelo are part of Colombia in addition to the islands, islets, keys, headlands, and sandbanks that belong to it.
>
> Also, part of Colombia is the subsoil, territorial sea, contiguous zone, continental shelf, exclusive economic zone, airspace, segment of geostationary orbit, and electromagnetic spectrum and the space where it operates, in accordance with international law, or with the laws of Colombia in the absence of international regulations.[23]

The Constitutional Court observed that the Constitution was based on two seemingly contradictory principles.[24] While Article 4 provides for the supremacy of the Constitution,[25] Colombia respects international law and is a party to the Vienna Convention on the Law of Treaties, which includes the principle *pacta sunt servanda*.[26] Combining these two principles, the Court held that '[i]t is the responsibility of the authorised interpreter of the Constitution to ensure its harmonisation'.[27]

On the other hand, in the Constitutional Court's view, 'It is the fundamental aim [of Colombia] to maintain territorial integrity… as well as the duty of its

[23] Constitución Política de la República de Colombia de 1991 promulgada en la Gaceta Constitucional n.° 114 del domingo 7 de julio de 1991. The English text of the Constitution is from the website of the Constitutional Court of Colombia.

[24] See further C-269/14 (n 4) pt III para 6.

[25] 'The Constitution provides the norm of regulations. In all cases of incompatibility between the Constitution and the statute or other legal regulations, the constitutional provisions shall apply. It is the duty of citizens and of aliens in Colombia to obey the Constitution and the laws, and to respect and obey the authorities'.

[26] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 26.

[27] 'Corresponde el intérprete autorizado de la Constitución, componen su armonización'. C-269/14 (n 4) pt III para 6.5.

authorities to ensure the inviolability of the territory, extended, in accordance with the applicable rules, to each of its components'.[28]

Under Colombian law, border treaties are ranked higher in the hierarchy of legal sources than the Constitution itself. However, the Pact of Bogotá does not have this status.[29] As a result, the Constitutional Court found that an international judgment issued on the basis of the Pact of Bogotá, which concerns a change to Colombia's borders, would be contrary to Article 101 of the Constitution.[30]

However, that was not the end of the decision in question. Because Colombia was defined as a State complying with international law, the Constitutional Court sought an interpretation of the Constitution that would be consistent with international obligations. It was stated that Article 101 of the Constitution only governs the procedure for altering the boundaries, whereas the Judgment in the *Territorial and Maritime Dispute* case imposed an obligation on Colombia to effect such a change. By separating these two effects, the Court concluded that Judgment of the ICJ in question was not contrary to the Constitution of Colombia.[31]

It is worth noting that even after this ruling, further attempts were made to undermine judicially the Judgment of the ICJ,[32] the decision of the Constitutional Court,[33] and even the 1928 Esguerra-Bárcenas Treaty.[34] None of these were successful.

IV. DIFFERENCES BETWEEN THE CONSTITUTIONAL COURT OF COLOMBIA AND OTHER HIGHEST NATIONAL COURTS

The starting point for any analysis of a domestic judgment on an international decision must be the observation that if a statute of an international court provides for the binding nature of its decision, it is a settled issue. With regard to judgments of the ICJ, it is regulated by Article 59 of the Statute. It states that '[t]he decision

[28] 'Es fin esencial [de Colombia], mantener la integridad territorial … así como la obligación de sus autoridades asegurar la inviolabilidad del territorio, extendido, de conformidad con las reglas aplicables, a cada uno de sus components'. (n 4) pt III para 8.3.

[29] (n 4) pt III paras 9.1–9.5.

[30] (n 4) pt III para 9.3.

[31] (n 4) pt III paras 9.6–9.15.

[32] See Case Auto 053/13 13 March 2013 Constitutional Court of Colombia (Corte Constitucional de Colombia).

[33] See Case Auto 057/14 11 March 2014 Constitutional Court of Colombia (Corte Constitucional de Colombia).

[34] See Case Auto 331/15 5 June 2015 Constitutional Court of Colombia (Corte Constitucional de Colombia); Case Auto 723/17 13 December 2017 Constitutional Court of Colombia (Corte Constitucional de Colombia).

of the Court has no binding force except between the parties and in respect of that particular case'.[35] As was held in the *Factory at Chorzów* case, 'attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court … is impossible'.[36] It is worth adding, following Judge Iwasawa, that international decisions in national courts are neither 'self-executory' nor 'self-executing', nor are they of 'direct applicability'. They can be only 'enforced', with 'their effects [being] accepted and recognised'.[37]

1. OBLIGATIONS OF RESULTS V OBLIGATIONS OF MEANS

States are free to choose the method of enforcement of an international judicial decision,[38] depending on the circumstances of the case and the wording contained in the decision itself.[39] The condition is that it must take place within a reasonable time.[40] Accordingly, enforcement constitutes an obligation of result.

The distinction between obligations of result and obligations of means is often unclear.[41] For example, the ICJ in the *Gabčíkovo-Nagymaros* case referred to 'obligations of conduct, obligations of performance, and obligations of result'.[42] In contrast, in the *Bosnian Genocide* case, only the dichotomous division was

[35] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993. See also Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 art 94(1): 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party'.

[36] *Factory at Chorzów (Indemnities) (Germany v Poland)* (Merits) (1928) PCIJ Ser A No 17, 33; Malcolm N Shaw, *Rosenne's Law and Practice of the International Court 1920-2015* (5th edn, Brill Nijhoff 2016) 219.

[37] Iwasawa (n 2) 260–1. See also Fulvio Maria Palombino, 'Les arrêts de la Cour internationale de Justice devant le juge interne' (2005) 51 Annuaire français de droit international 121, 122.

[38] See eg *Haya de la Torre (Colombia v Peru)* [1951] ICJ Rep 71, 79.

[39] See eg *Polish Postal Service in Danzig* (Advisory Opinion) (1925) PCIJ Ser B No 11, 29–30; Karin Oellers-Frahm, 'Article 94' in Bruno Simma and others (eds), *The Charter of the United Nations: a commentary* (3rd edn, Oxford University Press 2012) paras 6–7; Christian J Tams, 'Article 94 UN Charter' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) paras 11–12.

[40] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v United States of America) *(Mexico v United States of America)* [2009] ICJ Rep 3, 17 para 44; Robert Kolb, *La Cour internationale de Justice* (Pedone 2013) 862–3.

[41] Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford University Press 2013) 599.

[42] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 76–7 para 135.

presented (obligations of result and obligations of conduct).[43] One cannot but agree with the Thirlway's conclusion on this matter that the phrase 'obligations of means' fits better within the second category, as it includes both conduct and performance.[44]

From the perspective of national law, compliance with an international decision may require the adoption of national legislation.[45] International law does not interfere with the legislative process itself. It is, however, clear that no provision of national law, even of a constitutional nature, can justify non-compliance with a judgment.[46]

Nor is the lack of influence of executive power on the judiciary a prerequisite for exoneration.[47] As is well known from the *Certain German Interests* case, national judicial decisions are treated only as 'facts'.[48] As such, they can be assessed by international courts in terms of their compliance with international law.[49] Although scholars are divided as to the soundness of such a radical approach to national judgments,[50] the ICJ still tends to regard itself as a superior court to national courts and issues 'directives' on how the latter should act in certain situations.[51]

Sarmiento Lamus criticises the Constitutional Court for making the implementation of the *Territorial and Maritime Dispute* case conditional on compliance with the Constitution of Colombia.[52] However, it is precisely the correct

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[43] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 221 para 430.

[44] Thirlway (n 41) 1518–9.

[45] *Exchange of Greek and Turkish Populations* (Advisory Opinion) (1925) PCIJ Ser B No 10, 20; Krzysztof Skubiszewski, 'Wzajemny stosunek i związki pomiędzy prawem międzynarodowym i prawem krajowym' (1986) 48(1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 1, 7.

[46] See eg *Alabama Arbitration (United States of America v United Kingdom)* (1872) XXIX RIAA 125, 125; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) (1932) PCIJ Ser AB No 44, 24; VCLT art 26.

[47] Oellers-Frahm (n 39) paras 12–14; Shaw (n 36) 215; Tams (n 39) paras 19–23. See also ILC, 'Report of the International Law Commission on the work of its fifty-third session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10 art 4.

[48] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) (1926) PCIJ Ser A No 7, 19.

[49] See eg *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, 88 para 63.

[50] *Pro* Pierre d'Argent, 'Remarques sur le conflit entre normes de droit interne et de droit international' (2012) 45 Revue Belge de Droit International 355, 356. *Contra* Skubiszewski (n 45) 7; James Crawford, *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press 2019) 49.

[51] Oktawian Kuc, *The International Court of Justice and Municipal Courts: An Inter-Judicial Dialogue* (Routledge 2022) 64–70.

[52] Sarmiento Lamus (n 5) 415–6.

distinction between the obligations of result and the obligations of means, and the proper inclusion of the obligation to comply with the Judgment of the ICJ under the former, leaving the method to the imperative norm of Article 101 of the Constitution, which serves as a model example of resolving an apparent conflict.

A similar solution could have been adopted by the Constitutional Court of Italy in the 238/2014 case. It is recalled that the Tribunal in Florence[53] challenged the judgment of the ICJ in the *Jurisdictional Immunities* case, in which Italian proceedings, which denied Germany's jurisdictional immunity for the crimes of the Third Reich, were found to be in breach of international law.[54] The Constitutional Court declared the obligation for Italy to comply with that decision to be unconstitutional.[55] The reasoning behind that decision suggests that without violating jurisdictional immunity, Italy would not have been able to obtain due reparations from Germany.[56] The Constitutional Court apparently misunderstood the *Jurisdictional Immunities* case. The ICJ only ruled that the denial of jurisdictional immunity is contrary to international law but did not prohibit the pursuit of due reparations by Germany altogether. Italy was also declared free to choose the manner in which to guarantee Germany's jurisdictional immunity.[57] In any event, the aftermath of the 238/2014 case prompted Germany to initiate new proceedings against Italy before the ICJ.[58]

2. MONISM V DUALISM

Proceedings before the highest national courts, aimed at challenging an international judicial decision, are usually justified as attempts to 'protect' the national

[53] Joined Cases 84, 85 and 113/2014 21 January 2014 Tribunal of Florence (Tribunale di Firenze) (2013) 23 Italian Yearbook of International Law 436.

[54] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, 154 para 138.

[55] Case 238/2014 22 October 2014 Constitutional Court of the Italian Republic (Corte costituzionale della Repubblica Italiana) ECLI:IT:COST:2014:238.

[56] Paolo Palchetti, 'Judgment 238/2014 of the Italian Constitutional Court: In search of a way out' (2014) 2 Questions of International Law, Zoom-out 43; Fulvio Maria Palombino, 'Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles' (2015) 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 503, 512: The Constitutional Court of Italy ruled that way 'due to the lack of a judicial alternative remedy available to the victims of Nazi crimes'.

[57] *Jurisdictional Immunities of the State* (n 54) 155 para 139(4).

[58] *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v Italy)* (Pending) < https://www.icj-cij.org/case/183>. See further Karin Oellers-Frahm, 'Questions Relating to the Request for the Indication of Provisional Measures in the Case Germany v Italy' (2022) 94 Questions of International Law, Zoom-in 5.

legal systems. This is an indirect reference to the distinction between a monistic and a dualistic approach to international law.[59] It is recalled that, while dualism assumes that national law and international law are two separate legal systems, monism assumes their unity.[60]

Both Greenwood and Crawford have, however, argued that this division is irrelevant in practice.[61] No two national legal systems are identical, which is why there is no uniform pattern of monism or dualism.[62] Furthermore, the key is not the theoretical approach, but 'the general culture within a given national legal system and its receptiveness to the use of rules of international law'.[63] This is best demonstrated in the case of the 'conflict' between national and international law, which, according to d'Argent, occurs only in borderline situations where a national norm cannot be interpreted in a way that is consistent with an international norm.[64]

For example, although England is a dualist State in terms of treaties, these must be transposed by an Act of Parliament, the courts of England feel obliged to interpret statutes in a manner that is consistent with international obligations.[65] Another example could be found in some subsystems of international law, such as European Union law, where there is even an explicit obligation to interpret national law in accordance with international obligations.[66]

International law does not regulate its place within the legal systems of individual States.[67] Each State determines how its legal system relates to international law,[68] as this is purely a matter of constitutional choice.[69] From the perspective

[59] For some summary, see Crawford (n 50) 45–7.

[60] See also Giorgio Gaja, 'Dualism – a Review' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 52.

[61] Christopher Greenwood, 'The Development of International Law by National Courts' in Tiyanjana Maluwa, Max Du Plessis and Dire Tladi (eds), *The Pursuit of a Brave New World in International Law* (Brill 2017) 194–5; Crawford (n 50) 47.

[62] Crawford (n 50) 47.

[63] Greenwood (n 66) 195. It was previously proposed by Skubiszewski (n 45) 9. It goes without saying that the receptiveness of national courts to international decisions is a complex and wide-ranging issue. See eg Oktawian Kuc, 'Reception of ICJ Jurisprudence by Domestic Courts in the Field of International Law of the Sea' in Tomasz Kamiński and Karol Karski (eds), *40 Years of the United Nations Convention on the Law of the Sea* (Routledge 2024).

[64] d'Argent (n 50) 360–1.

[65] However, this has its limits; if the statute is clear and unambiguous, the English court must apply it, even if it contradicts international law. *Salomon v Commissioners of Customs and Excise* (1967) 2 QB 116, 143. Greenwood (n 66) 195.

[66] See Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153.

[67] See eg d'Argent (n 50) 357.

[68] Crawford (n 50) 102.

[69] Greenwood (n 66) 195.

of international law, any 'conflict' between a national norm and an international norm exists solely within national law.[70] The coexistence of a given norm in both national and international legal systems is also irrelevant.[71]

In Colombia's decision in question, the Constitutional Court clearly emphasised its duty to seek an interpretation of the Constitution that would be consistent with Colombia's international obligations. One may have objections to the argument that Colombia adheres to international law because it is required by the Constitution, rather than because it is a direct obligation under international law,[72] but it is difficult to expect a different stance from a constitutional court. Moreover, it is worth noting that the Constitutional Court is aware that its decision, whatever it may be, does not per se exempt Colombia from complying with its international obligations.[73] The dualist nature of Colombia was, therefore, not used for confrontational purposes.

A completely different position has been adopted in Russia. Following an unfavourable ruling by the European Court of Human Rights (ECtHR), a case was referred to the Russian Constitutional Court, which ruled that it should have the right to declare the unenforceability of any decision of the ECtHR deemed 'contrary' to the Russian Constitution.[74] As a result, the Act on the Constitutional Court was amended accordingly. Exercising the powers granted to it, the Court did not hesitate to 'pragmatically' declare the unenforceability of the judgment, which required Russia to pay substantial compensation to individual applicants.[75]

Similarly, in Poland, at the request of the politicians of the then parliamentary majority and the President, the Constitutional Tribunal examined the constitutionality of several international judicial decisions, even though this competence did not directly arise from the Constitution.[76] In all cases, the unconstitutionality of the provisions of international treaties, as interpreted by international courts, was declared. This applied, *inter alia*, to the assessment of the reform of the judiciary system, the National Council of the Judiciary, and interim measures in this

[70] d'Argent (n 50) 356.

[71] *Avena* (n 1) 65 para 139; Thirlway (n 41) 1160–2.

[72] See C-269/14 (n 4) pt III para 9.6.

[73] (n 4) pt III para 9.5.

[74] Case 21-П/2015 14 July 2015 Constitutional Court of the Russian Federation (Конституционный Суд Российской Федерации). For more general information see Lauri Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015' (2016) 12 European Constitutional Law Review 377.

[75] See eg Case 12-П/2016 19 April 2016 Constitutional Court of the Russian Federation (Конституционный Суд Российской Федерации).

[76] For more general information see Anna Wyrozumska, 'Conflict between the Polish Constitutional Tribunal and the CJEU with Regard to the Reforms of the Judiciary' (2022) 60 Archiv des Völkerrechts 379.

regard by the CJEU,[77] as well as to the finding by the ECtHR of irregularities in the composition of the Constitutional Tribunal itself.[78]

The content of the decisions of the Constitutional Court of Russia, the Constitutional Tribunal of Poland, and the Constitutional Court of Italy indicates that their substance does not stem from a dispute between monistic and dualistic approaches. In all cases, the courts recognised their obligation to 'protect' the national legal system and demonstrated a marked unresponsiveness to international law. This stands in stark contrast to the approach of the Constitutional Court of Colombia.

V. CONCLUDING REMARKS

Based on the analysis conducted, the following conclusions can be drawn:

The proceedings before the Constitutional Court of Colombia were a classic example of a politically motivated process aimed at securing a ruling from the highest national court, declaring the unfavourable international decision unenforceable within the State, and thus claiming that the State was freed from its obligation to comply with that international decision.

Despite political expectations, the Constitutional Court of Colombia did not challenge the Judgment of the ICJ in the *Territorial and Maritime Dispute* case. While affirming the supremacy of the Constitution, it recognised the constitutional duty for Colombia to comply with international law. The Court felt obliged to find an interpretation of the Constitution that would be consistent with international obligations.[79]

From the perspective of international law, Colombia's decision in question was indirectly based on the distinction between obligations of result and obligations of means. It also serves as proof of the inadequacy of the traditional division into monism and dualism (Colombia is a dualist State). What is important, instead, is the receptiveness of the national court to international law.

Constitutional courts in other States, such as Italy, Russia, and Poland, have proven to be completely unresponsive to obligations regarding the enforcement of

[77] See eg Case Kpt 1/20 21 April 2020 Constitutional Tribunal (Trybunał Konstytucyjny) OTK ZU A/2020 item 60; Case P 7/20 14 July 2021 Constitutional Tribunal (Trybunał Konstytucyjny) OTK ZU A/2021 item 49; Case K 3/21 7 October 2021 Constitutional Tribunal (Trybunał Konstytucyjny) OTK ZU A/2022 item 65.

[78] Case K 6/21 24 November 2021 Constitutional Tribunal (Trybunał Konstytucyjny) OTK ZU A/2022 item 9.

[79] It should be noted that the decisions of the ICJ in two other proceedings involving Nicaragua and Colombia were not challenged before the Constitutional Court of Colombia.

international judicial decisions. These highest national courts have wrongly acted as though their decisions could unilaterally exempt the States from international obligations.

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NOTES ON EXTERNAL POWERS OF AUTONOMOUS INSTITUTIONAL ARRANGEMENTS

Abstract

The primary aim of this article is to analyze the external powers of the Autonomous Institutional Arrangements (AIAS), with a particular focus on their treaty-making powers. AIAs represent a largely overlooked phenomenon in contemporary international institutional law, yet by the will of States they possess and exercise certain powers. These include not only internal (*pro foro interno*) powers but also significant external (*pro foro externo*) powers, such as law-making powers and treaty-making powers. This enables AIAs, much like international organizations, to influence the evolution and development of modern international law. Examining the legal status of such bodies must be based on the rules of the law of treaties and international institutional law. Such a discussion is necessary insofar as academic research should answer the needs of international practice. Moreover, in Polish international law scholarship, these issues remain underexplored, highlighting the need for further study.

KEYWORDS

Autonomous Institutional Arrangements (AIAs), Multilateral Environmental Agreements (MEAs), international organizations, external powers, treaty-making powers

SŁOWA KLUCZOWE

autonomiczne instytucje implementacyjne, wielostronne traktaty środowiskowe, organizacje międzynarodowe, stosunki zewnętrzne, kompetencje traktatowe

I. INTRODUCTION

In the process of implementing of international co-operation between States, we find, first of all, international governmental organizations (IGOs), which are usually referred to as 'fully-fledged international organizations', as well as other, less formalized institutions of such cooperation. IGOs are currently the most important non-State members of the international community. It is also indisputably true that they need to be considered as subjects of international law. The creation of international organizations and their dynamic development, particularly from the second half of the 20th century, have played a pivotal role in the evolution of international law. In her study, Boisson de Chazournes emphasizes that in modern international relations '[c]ooperation through international organizations has become a fundamental pillar of the international legal order'.[1] IGOs stemmed from the practical necessity for States to co-operate in various and often rather technical areas. Their dynamic development has resulted not only in the institutionalization of international co-operation, but also in their becoming, alongside States, key actors in modern international relations. The dynamic evolution of IGOs in recent times has engendered significant transformations in the international community, in turn calling for a redefinition of the concept of international law as a natural consequence of this process. This process has been termed by some as an 'organizational revolution'. International organizations have become important actors on the international scene. They now constitute a unique apparatus for law-making and other international activities and remain at the forefront of the development of some areas of modern international law. The proliferation of international organizations and the continual extension of the fields of activity they cover has made them a necessary tool in shaping international co-operation.

The international co-operation between States frequently takes place outside official forms of international organizations. There are various reasons States prefer less formal ways of co-operating. Such co-operation may then be more flexible and its forms easier to modify. Such forms of co-operation are described

[1] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations* (Leiden, Brill Nijhoff 2017) 1.

by some as 'soft organizations'.[2] The evolution of the forms of co-operation within such institutions is much easier than in the case of international organizations. Such cooperation is based on an international arrangement, but the extent to which it is formalized or institutionalized varies – Conference on Security and Co-operation in Europe (CSCE) being a good example.[3] Sometimes such cooperation undergoes evolutionary changes and transforms into an international organization, but sometimes it simply continues as an informal co-operation and remains so. In this context, it is important to keep in mind some other institutions of international cooperation that are not classified as international organizations, but which are developing dynamically in some areas of cooperation. This is a growing group of entities called 'treaty bodies'. In practice, treaties, or more broadly speaking treaties and other instruments governed by international law, may establish either international organizations or less formalized forms of international cooperation referred to as 'soft organizations', and other entities of cooperation traditionally defined as treaty bodies. Although treaty bodies are similar to international organizations and more flexible forms of co-operation indicated above, there exist substantial differences between them. Grasping these similarities and differences is rather complicated and as Klabbers noted: '[i]n what exactly the distinction between an organization and a treaty organ resides is unclear'.[4] Problems with a clear-cut classification of treaty bodies also arise from the fact that the doctrine offers different names and terms for these institutions of co-operation. For instance, in Polish legal doctrine on international law, apart from a literary translation of the term 'treaty bodies' (Pl *organy traktatowe*), there appear such terms as international organs established by a treaty and autonomous implementation institutions.[5] In practice, it is difficult to distinguish treaty bodies from international organizations or other more flexible forms of co-operation, but it is also difficult to provide an unambiguous and clear-cut assessment of treaty bodies. This is because treaty bodies take a variety of forms and serve a variety of functions. This considerable variety in treaty bodies, both with regards to their designation and organizational structure, means that they must be assessed *ad casum*. Treaty bodies function in a number of different fields of international co-operation. Clearly, however, in the broadest terms we will find them in two

[2] Geir Ulfstein, *Institutions and Competences*, in J. Klabbers, A. Peters, G. Ulfstein (eds), *The Constitutionalization of International Law* (Oxford, Oxford University Press 2009) 51.

[3] Laurence Boisson de Chazournes, Andrzej Gadkowski, *The External Relations of the* OSCE, in: M. Steinbrück Platise, C. Moser, A. Peters (eds), *Revisiting the Legal Status of the OSCE* (Cambridge, Cambridge University Press 2019) 214.

[4] Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge, Cambridge University Press 2015) 10.

[5] Anna Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* (Warszawa, Wydawnictwo Prawo i Polityka Gospodarcza 2006) 108.

areas of international co-operation: the international protection of human rights and international environmental law.

Treaty bodies found in Multilateral Environmental Agreements (MEAs), which are traditionally referred to as Autonomous Institutional Arrangements (AIAs), are extremely specific in nature and, as a result, were and still are perceived as 'a little-noticed phenomenon in international law'.[6] AIAs are particularly characteristic of the environmental treaty system, described by Gehring as forming 'hybrid structures somewhere between traditional international treaties […] and international organizations […] In addition to substantive obligations, they include institutional components of varying design, which are, compared to multilateral agreements in other policy fields, remarkably strong'.[7] The creation and development of AIAs appears to reflect the unique tendency for development in international environmental law. This tendency arose, *inter alia*, because individual environmental agreements (primarily universal, but also regional) formed specific treaty institutions and entrusted them with the decision-making functions within a given agreement.[8] Some commentators are of the opinion that this tendency is a reflection of the States' parties to MEAs recognizing their common interest in matters that are often of a global nature.[9] International environmental law has developed rapidly since the 1970s, and this has led to the adoption of international conventions, both universal and regional, concerning the environment in general and within specific issues. This process reflected the evolution of international environmental law. The treaties regulating the increasingly dynamic cooperation between States in this field are an illustration of the apparent paradox whereby treaties must be both stable on the one hand but flexible on the other. As a feature of environmental treaties, flexibility is mainly the result of scientific and technical progress, as well as the introduction of new technologies in environmental research and the sustainable use of environmental and natural resources. The requirement of flexibility applies not only to MEAs themselves but also to the institutional forms of co-operation they establish, such as treaty bodies and, in particular, AIAs. As a result of this, and in order to implement the cooperation provided for in these conventions, States gradually ceased to resort to traditional

[6] Robin Churchill, Geir Ulfstein, '*Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law'* (2000), 94(4) American Journal of International Law 623.

[7] Thomas Gehring, *Treaty-Making and Treaty Evolution*, in D Bodansky, J Brunnée, E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2014) 468.

[8] List of MEAs, see Andrzej Gadkowski, *Treaty-Making Powers of International Organizations* (Poznań, Wydawnictwo Naukowe UAM 2018) 251ff.

[9] Rudiger Wolfrum, Volker Roben, *Developments of International Law in Treaty Making* (Berlin, Springer 2005) 153.

institutional actors, namely international organizations, for the implementation of cooperation specified in these conventions and began to choose other forms of co-operation.[10]

These forms were more informal and flexible, as well as more effective and often more innovative than international organizations. Some commentators who have examined the reasons States established these new treaty bodies describe them as an 'institutional economy'.[11] Clearly, this does not mean that since then treaty bodies have represented the only form of co-operation in the institutional structure of contemporary MEAs. Some of these agreements still see co-operation as based on existing international organizations, the most noteworthy examples being the two 1986 post-Chernobyl conventions. Yet, all universal MEAs concluded today establish treaty bodies: Conferences of the Parties (COPs), or Meetings of the Parties (MOPs).

It appears that three important reasons seem to have been behind the evolution of the institutional arrangements provided for in MEAs. Firstly, the number of MEAs began to rise sharply as a result of the United Nations (UN) Conference on Human Environment. Secondly, as international environmental law was dynamically developing, effective measures and methods for its implementation were required. Traditional forms of co-operation within the framework of international organizations failed to guarantee effectiveness, not only with regard to managing various projects but also in ensuring the flexible implementation of legal regulations and their modification to meet the requirements of practice. A much greater probability of fulfilling these tasks was guaranteed with more flexible forms of co-operation: treaty bodies. Thirdly, at the end of the 20th century, States clearly demonstrated their dissatisfaction with the way many international organizations operated, for such trivial reasons as their operating costs or bureaucratic nature. Seeking new forms of co-operation, particularly in the area of environmental protection, that would be more acceptable to States developed as a consequence of this criticism of international organizations. It was, therefore, decided that new, stronger institutional arrangements were necessary for a dynamic evolution of MEAs. The hopes of States understandably lay in AIAs, which have since become the most recognizable feature of MEAs.[12] For all these reasons, the conclusion of MEAs may be considered the main vehicle of development and one of the greatest achievements in the process of evolution of the international environmental law.

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[10] Karen N Scott, *Managing Fragmentation through Governance: International Environmental Law in a Globalised World*, in A Byrnes, M Hayashi, Ch Michaelsen (eds), *International Law in the New Age of Globalization* (Martinus Nijhoff, Leiden-Boston 2013) 207.

[11] Geir Ulfstein, *Treaty Bodies*, in D Bodansky, J Brunnée, E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2014) 886.

[12] Thomas Gehring, 'International environmental regimes: dynamic sectoral legal systems' (1991), 1 Yearbook of International Environmental Law 35.

All of this underscores the relevance of presenting this compelling research issue. The author argues that AIAs, by the will of States, possess powers typical of international organizations in both their internal and external relations. This is especially significant in the context of their ability to exercise law-making and treaty-making powers. To support this argument, the author will examine a notable example of the 1992 UN Framework Convention on Climate Change and the Green Climate Fund and its relations with the the Green Climate Fund.

An appropriate methodology is essential for examining research issues in a way that effectively meets the study's objectives and addresses its key questions. The most common approach in legal methodology is the legal dogmatic method, without which proper analysis of the sources of international law and, in particular, international institutional law would not be possible.[13] In order to achieve the aim of this study it will be necessary to draw heavily on the comparative research method.

II. AUTONOMOUS INSTITUTIONAL ARRANGEMENTS – LEGAL BASIS AND INSTITUTIONAL STRUCTURE

The legal basis of AIAs, similarly to those of typical international organizations, is specified, in particular, by the provisions of multilateral international agreements. This position should be clarified by saying that in international environmental law this legal basis is provided by typical MEAs, the protocols that usually supplement these emphasized that in the process of developing international environmental law the number of these amendments is almost equal to, or perhaps even greater than, the number of agreements, as has been the case in recent years. The prototype of the MEA was undoubtedly the 1971 Ramsar Convention on Wetlands of International Importance.[14] It established an autonomous institutional arrangement which is today commonly referred to as the Conference of the Parties (COP). This convention initiated the dynamic development of MEAs and AIAs established on their basis. In practice, it is the case that the legal basis for the creation and functioning of treaty bodies in international environmental law is to be found not only in typical MEAs, but also in other international agreements, some of which constitute significant codifications of international law.

[13] The concept of international institutional encompasses not only international organizations, but also extends more broadly to international institutions. This is explored in detail by Henry G. Schermers, Niels M. Blokker, *International Institutional Law* (Martinus Nijhof Publishers, Leiden, Boston 2011) 1ff.

[14] United Nations Treaty Series (UNTS) Vol 996, 245.

An example is the 1982 UN Convention on the Law of the Sea (UNCLOS), which provides for a treaty body called the Meeting of the Parties to the Convention (SPLOS).[15] As a special treaty body it is more than simply an important forum for the development of the international law of the sea.

This means that the legal bases of AIAs are broad and varied. Definitively, therefore, it should be stated that primary source of these institutions is the will of States. The will of States expressed in agreements forms the basis for institutional arrangements, arrangements which constitute entities that are autonomous in character. As a result, their status may be compared to those international organizations that also constitute autonomous entities, usually established under international agreements.

It is important to note that in the case of typical IGOs, their institutional structure is specified in its constituent instruments and depends on the specific nature of the organization. In fact, the diversity of international organizations implies diversity in the institutional set-up of their structures. In MEAs, however, we usually find solutions in line with an institutional model designed by the United Nations Environment Programme (UNEP).[16] For this reason, it is often stressed in the literature that the institutional structures developed in international environmental law are often reproduced in subsequent MEAs, in particular with reference to the powers of AIAs. The fact that modern MEAs are concluded in accordance with the UNEP institutional model means that every such agreement has its own institutional apparatus consisting of treaty bodies. The typical institutional framework of an MEA is generally organized in a hierarchical way, with a plenary body which holds decision-making powers and occupies the highest position (COP). This body is traditionally supported by temporary or permanent subsidiary bodies together with a secretariat dealing with administrative and organizational matters. Some AIAs explicitly provide for such a hierarchy of treaty bodies, while other agreements only specify that their subsidiary bodies and secretariats operate under the guidance of the COP. This institutional model of MEAs, which was adopted in the 1973 Washington CITES Convention[17] and which was later repeated in other environmental agreements, is commonly referred to as the COP model.[18]

When identifying the COP model as prevalent in modern environmental agreements, one should bear in mind that, while it may be the most important today, it is not the only form of institutional structure of such agreements. Only in

[15] UNTS Vol 1833, 3.

[16] Laurence Mee, 'The Role of UNEP and UNDP in Multilateral Environmental Agreements' (2005), 5 International Environmental Agreements: Politics, Law and Economy 227, 263.

[17] UNTS Vol 1046, 120.

[18] Nikolaos Lavranos, 'Multilateral Environmental Agreements: Who Makes the Binding Decisions?' (2002), 11 European Environmental Law Review 44, 50.

a few of the MEAs concluded after 1972 has the institutional structure been based on existing international organizations (International Atomic Energy Agency (IAEA), International Maritime Organization (IMO)). As a rule today, MEAs establish no new international organizations that would be used to implement their provisions.

The status of the COP as hierarchically the most important in the institutional structure of MEAs results primarily from its being a plenary body that may be compared to its plenary body, if not to the international organization itself, than to its plenary body. A commonly accepted characteristic of this body in comparison with the plenary bodies of international organizations is the fact that it is less costly and less bureaucratic. It also holds conferences in different States, which is welcomed particularly by the developing ones as they are rarely the seats of universal international organizations. Although the COPs are a less formal structure than the plenary body of an international organization, they usually possess and exercises law-making powers, both internally and externally. Although the Conference of the Parties is the commonly accepted name for this body, in practice other names are also used, for example Meeting of the Parties, Executive Bureau and Consultative Meeting. The many names for this body alone support the claim that it is far less formal in character than the plenary body of an international organization.[19]

It has been considered that the emergence and subsequent development of such bodies reflected a dissatisfaction with international organizations, and thus the development of such bodies became an alternative model of international co-operation.[20] As emphasised by Fitzmaurice, the powers of COPs established on the basis of MEAs are used to fill gaps in vague treaty provisions and to set up compliance regimes. Looking at the activity of COPs (MOPs), Fitzmaurice observed that their functions derived from the law of treaties, as well as from alternative sources. In conclusion, she also claimed that 'it is a new way of international law-making and a new way of expressing consent to be bound, which modifies traditional ways enumerated in Article 11 of the VCLT [Vienna Convention on the Law of Treaties]'.[21]

COPs as plenary bodies reflect the political will of the contracting States. As such, they represent supreme decision-making bodies in the institutional structures of all modern MEAs. As Camenzuli stresses, generally speaking COPs exist to 'set priorities and review implementation of the Convention based on reports

[19] Philippe Sands, Jaqueline Peel, *Principles of International Environmental Law* (Cambridge, Cambridge University Press 2003), 84, 85.

[20] Robin Churchill, Geir Ulfstein (n 6) 623ff.

[21] Malgosia Fitzmaurice, *Law-making and international environmental law. The legal character of decisions of conferences of the parties,* in R. Liivoja, J. Petman (eds), *International Law-making. Essays in honour of Jan Klabbers* (Oxon, Routledge 2014) 210.

submitted by governments; consider new information from governments, NGOs and individuals to make recommendations to the Parties on implementation; make decisions necessary to promote effective implementation; revise the treaty if necessary; and act as a forum for discussion on matters of importance'.[22] The specific powers of COPs, particularly in external relations and including their treaty-making powers, will be discussed below.

III. EXTERNAL POWERS OF THE AUTONOMOUS INSTITUTIONAL ARRANGEMENTS

Contemporary AIAs, which operate under the regime of international environmental law, without doubt represent a distinct and different approach to institutionalised forms of co-operation between States, which often resemble classic international organizations.[23] A comparison of AIAs with international organizations to help determine whether these special treaty bodies may be defined as international organizations requires some initial remarks on their external powers. This issue should be discussed from the perspective of the potential international legal personality of AIAs and particularly in the context of their treaty-making powers.[24] When an international entity, such as an international organization, has international personality, it may undertake independent activity internationally without the assistance of its Member States. International practice shows that, since 1990, the constituent instruments of international organizations have increasingly contained provisions expressly referring to their international legal personality. Explicitly providing for the international legal personality of an international organization in its statute, however, is not a *sine qua non* for using this personality in practice. International legal personality may be implied from the nature of a given organization, as well as from its functions and powers. If we go on to apply these observations to modern AIAs, we may say that there are no MEAs that would explicitly define their bodies, particularly COPs, as international legal persons. As Ulfstein highlights, the provisions of MEAs provide for the implementation of a kind of foreign policy.[25] This foreign policy includes such important matters as the relationship to the international organization or

[22] Louise K. Camenzuli, *The development of international environmental law at the Multilateral Environmental Agreements' Conference of the Parties and its Validity* (2007) 7 <https://wwfin.awsassets.panda.org/downloads/mea_3.pdf> accessed 30 December 2023.

[23] Karen N Scott (n 10) 217.

[24] Andrzej Gadkowski (n 8) 270ff.

[25] Robin Chrurchill, Geir Ulfstein (n 6) 885.

State hosting the secretariat, which requires an appropriate agreement; financial assistance related to the implementation of commitments, which requires arrangements with international financial institutions; and co-operation between different MEAs and international organizations on various environmental matters, which also requires appropriate agreements that may take the form of memoranda of understanding. We, therefore, need to find those provisions of MEAs that explicitly or implicitly confer on their institutions such external powers, particularly treaty-making powers, that determine their ability to function as international legal persons within a certain scope. It is necessary, therefore, to look for the legal capacity of AIAs in a wider context by deducing it from 'the chain of legal relationships that arise from various legal instruments surrounding the MEA'.[26] This will clearly not enable us to automatically classify such bodies as international organizations. Although the provisions of MEAs do not expressly vest AIAs with international legal personality, some commentators recognise this personality, or at least some of its attributes, and its justification may be found in the opinions of the UN Office of Legal Affairs (UNOLA) quoted below.

The primary source of the external powers of AIAs is without doubt the will of States. As was explained above, the legal basis of AIAs, like the legal basis of typical international organizations, may be found in the provisions of international agreements – MEAs – which may be defined both as classic environmental agreements and as protocols or amendments to these agreements and protocols. Since MEAs do not provide *expressis verbis* the legal personality of AIAs, this personality must be deduced from the provisions specifying their external powers, particularly treaty-making powers, or allow their implication, as in the case of the constituent instruments of international organizations. That MEAs do not contain explicit provisions defining the treaty-making powers of AIAs holds true for most international organizations.

In contemporary practice the treaty activity of different international organizations was, and remains, to a large extent conducted based on the doctrine of implied powers, doubtlessly one of the most characteristic features of modern international institutional law. The claim that the treaty-making powers of AIAs may be implied just like the treaty-making powers of international organizations appears rational and justified. States opting to create such autonomous institutions were driven mostly by practical reasons, usually described as institutional economy. Indeed, it appears rather unlikely that the States that are parties to MEAs wanted the institutions established under these agreements to be less effective in implementing environmental agreements. The dynamics of environmental co-operation, however, require forms of co-operation that are less complex and

[26] Bharat Desai, *Multilateral Environmental Agreements. Legal Status of the Secretariats* (Cambridge, Cambridge University Press, Cambridge 2010) 140.

more flexible, more innovative and cheaper, but not less effective, than classic international organizations. In order to ensure the effectiveness of AIAs, they need to be granted specific powers in external relations, especially treaty-making powers, on similar terms as traditional international organizations.

The provisions of MEAs are usually structured in such a way as to enable their powers in internal relations, and especially the law-making powers of COPs, to be implied. In the case of AIAs, as in the case of classic international organizations, the rules of implication of internal powers are clearly different from the rules of implication of external powers. There are, nevertheless, no reasons that would make implication of the external powers of AIAs, and particularly their treaty-making powers, impossible. It does seem, however, that the extent to which AIAs, and especially COPs, possess such powers is less clear than in the case of traditional international organizations. One may, however, say without doubt that these powers are limited mostly by the nature and functions of a given treaty body. It also seems that in practice they are orientated towards co-operation with similar bodies established by other MEAs, with international environmental institutions, such as UNEP or the Global Environmental Fund, and with international non-governmental organizations of a scientific and technical nature.[27] The process of implying the powers of AIAs clearly creates problems and elicits questions, already considered in the context of implying the treaty-making powers of international organizations; yet these problems and questions are unavoidable when implying the powers of any entity established on the basis of the will of States. Every such entity, even one with a distinct legal personality, is merely a non-state entity. It is obvious, however, that if the international legal personality and treaty-making powers of AIAs are rarely expressly provided for in the provisions of MEAs, and if such institutions are created by States for the effective implementation of specific environmental agreements, their internal and external powers may be implied on similar terms as those accepted and used in implying the powers of international organizations.

Discussions on the treaty sources of the treaty-making powers of AIAs usually cite Article 7(2) of the 1992 UN Framework Convention on Climate Change (UNFCCC).[28] Its content is not only considered a model example of specifying the internal and external powers of AIAs in the provisions of a typical MEA, but is also the subject of three consecutive opinions of the UN Office of Legal Affairs. According to one of these opinions dated 1995, the treaty bodies established by this Convention 'have certain distinctive elements attributable to international organizations'.[29] All commentators agree that the provisions of the UNFCCC, and

[27] Karen N Scott (n 10) 214.

[28] UNTS Vol 1771, 107.

[29] United Nations Juridical Yearbook (UNJY) 1995, 452.

particularly the catch-all phrase in Article 7(2), may be understood as conferring treaty-making powers on environmental treaty bodies, and in particular on COPs, as supreme autonomous institutional arrangements.[30]

Article 7(2) assumes that the COP is the supreme body of the UNFCCC and as such it 'shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention'. As for the COP's powers in external relations, Article 7(l) stipulates that COPs shall 'seek and utilise, where appropriate, the services and co-operation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies'. By contrast, the implementation framework for the treaty-making and other powers of COPs are found in a clause contained in Article 7(2)(m), which stipulates that COPs may 'exercise such other functions as are required for the achievement of the objective of the Convention, as well as all other functions assigned to it under the Convention'. This clause explicitly refers to the objective and functions of the Convention, namely the classic conditions for implication of the treaty-making powers of international organizations which were confirmed by the case law of both the International Court of Justice (ICJ) and the Court of Justice of the European Union (CJEU). These provisions support the above claim that the treaty-making powers of AIAs may be implied on similar grounds as the external powers of international organizations. The provisions of the UNFCCC also provide for the external powers of another treaty body of this Convention: the Secretariat. Article 8(2)(f) stipulates that the Secretariat shall have powers to 'enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions'. It follows that these powers may also be implied in order for this treaty body to fulfil its functions.

The above provisions of Articles 7 and 8 of the UNFCCC were cited by the UNOLA in three consecutive opinions, dated 1993, 1994 and 1995, pertaining to the arrangements for the implementation of the provisions of Article 11 of the UNFCCC concerning the financial mechanism, specified as a mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology. In these opinions, the UNOLA invoked the provisions of Article 6 of the 1986 Vienna Convention concerning agreements concluded between States and international organizations, or between international organizations.[31] Article 6 of this Convention provides that the powers of an inter-

[30] Geir Ulfstein (n 11) 886.

[31] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations signed at Vienna on 21 March 1986, UN Doc. A/CONF.129/15; 25 ILM 543.

national organization to conclude treaties be governed by the regulations of the organization concerned. Whether this assumption means that, according to the UNOLA, the status of the UNFCCC treaty bodies is the same as the status of international organizations is uncertain.

In all three opinions, the UNOLA considered matters relating to arrangements for the financial mechanism and for technical and financial support to developing country parties and, in particular, the implementation of Article 11 of the UNFCCC. In these opinions, the UNOLA highlighted significant differences between the legal status of the COP as a UNFCCC treaty body and the Global Environmental Facility (GEF) as a parent institution of the World Bank, the UNDP and UNEP.[32] In its opinion of 2 December 1993, the UNOLA explicitly stated that 'the Conference of the Parties (COP) has the legal capacity, within the limits of its mandate, to enter into agreements and other arrangements with entities, such as States, intergovernmental and non-governmental organizations and bodies, which also have the authority to do so'.[33] On the other hand, the UNOLA had no doubt that the GEF 'does not, at the present time, have the legal capacity to enter on its own into agreements and arrangements with other entities. If the COP wanted to use the present GEF as an operating entity, it would have to enter into agreement or an arrangement with the World Bank as the parent organization'.[34] At the same time, the UNOLA stated that it was not possible to determine whether a restructured GEF would have legal capacity, particularly the capacity to enter into agreements or other arrangements with entities such as COPs. Indeed, the answer to this question depends on the status and structure of the restructured GEF. After the UNFCCC came into force, which followed the first restructuring of the GEF – that is once the three-year pilot phase (1991–1994) was over – UNOLA issued a second opinion on the matter, dated 23 August 1994. In it, the UNOLA confirmed that COPs have international legal personality and may enter into legally binding agreements and arrangements, including agreements with the World Bank concerning the financial mechanism operated by the GEF. The UNOLA also pointed out that the GEF is a subsidiary body of the World Bank and the UN, acting through the UNDP and UNEP, and 'while its organs have considerable authority in governance of the GEF activities, the founders of the restructured GEF did not provide it with the legal capacity to enter into legally binding arrangements or agreements'.[35] In other words, the GEF still had

[32] See: Laurence Boisson de Chazournes, 'The Global Environmental Facility (GEF): a unique and crucial institution' (2005), 14(3) Review of European Community and International Environmental Law 193 and 'The Global Environmental Facility Galaxy: on Linkages among Institutions' (1999), 3 Max Planck Yearbook of United Nations Law 254.

[33] UN Doc. A/AC.237/50, para 22.

[34] ibid.

[35] UN Doc. A/AC.237/74, para 18.

no possibility to enter into arrangements or agreements on its own, and if any co-operative arrangement or agreement was negotiated by the GEF with the COP, it had to be formalised by the World Bank.[36] It thus follows from this opinion that the GEF's parent institutions bestowed on it no legal capacity to enter into legally binding arrangements or agreements without the formal approval of the World Bank.[37] In a subsequent opinion, dated 8 March 1995, the UNOLA repeated and even elaborated upon its previous position on the legal capacity and treaty-making powers of the UNFCCC treaty bodies, namely both the COP and the Secretariat.[38] Based on the analysis of the legal nature and functions of both of the UNFCCC treaty bodies, the UNOLA concluded that they shared certain characteristics with international organizations.

On the other hand, the UNOLA opinions emphasised that the GEF, as an operating financial entity of the UNFCCC, had no legal capacity of its own to enter into agreements or arrangements with other institutions. Such a position, however, is unclear. The restructured GEF, certain commentators stress, at the very least resembles an international organization. Whether it has the legal capacity to enter into agreements could therefore be open to question,[39] a view which is supported by practice. The UNOLA held that there were significant practical issues, such as 'accountability, observance of compliance with the eligibility criteria for funding, procedures for the reconsideration of particular funding decisions and […] procedures for joint determination and periodical review of the aggregate GEF funding necessary and available for the implementation of the Convention',[40] which should be regulated by an agreement concluded between the COP, as a treaty body of the UNFCCC, and the GEF. These matters were covered by the Memorandum of Understanding (MOU) between the COP to the UNFCCC and the Council of the GEF of 19 July 1996.[41] The binding force of MOUs is extensively discussed in the doctrine, but is not the subject of this thesis; still, it should be borne in mind

[36] ibid para 19.

[37] Friedrich Soltau *Fairness in International Climate Change Law and Policy* (Cambridge University Press, Cambridge, 2009) 212.

[38] UN Doc. A/AC.237/91.

[39] Jacob Werksman, 'Consolidation Governance of the Global Commons: Insights from the Global Environmental Facility' (1995), 6 Yearbook of International Law 54 and Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Brill, Leiden, 2005) 95ff.

[40] UNFCCC Documentation, UN Doc A/AC.237.74, 23 August 1994; *Modalities for the functioning of operational linkages between the Conference of the Parties and the operating entity or entities of the financial mechanism: legal opinion of the United Nations Office of Legal Affairs*, para 16.

[41] Decision 12/CP.2, annex, UN Doc. FCCC/CP/1996/15/Add.1.

that MOUs are usually non-binding agreements.[42] Scholars studying this particular MOU emphasise that 'the tenor of the wording indicates its non-binding character by using "will" and "should" rather than "shall", although it also states that the two secretariats "shall co-operate"'.[43] If our evaluation of this document is based on the UNOLA's view expressed in the 1994 opinion, according to which the GEF has no legal capacity to enter into legally binding arrangements or agreements, it will be rather difficult to accept the binding force of this MOU. There is little doubt that if our evaluation considers the actual treaty-making powers of the COP as a UNFCCC body, as well as the assumption that not every MOU is, as a rule, a non-binding instrument, then we shall be unlikely to arrive at a definite conclusion.

When analysing the treaty-making powers of the COP to the UNFCCC as those of a typical MEA treaty body and examining the relationship between this convention and the GEF as its operating financial mechanism, one needs to bear in mind certain changes that took place in this regard. In 2010, the Conference of the Parties to the UNFCCC held in Cancun adopted a decision which established the Green Climate Fund (GCF) as an operating entity of the financial mechanism of the UNFCCC.[44] Its governing instrument was adopted in 2011 at the COP meeting in Durban.[45] By decision 3/CP17, the COP was deemed to confer juridical personality and legal capacity on the Fund. Paragraph 11 of the decision provides that the COP '[d]ecides that the Green Climate Fund be conferred judicial personality and legal capacity and shall enjoy such privileges and immunities related to the discharge and fulfilment of its functions'.[46] In June 2013, an Agreement between the Republic of Korea and the Green Climate Fund concerning the Headquarters of the Green Climate Fund was signed.[47] Article 13 of this provides that '[t]he Fund shall possess such juridical personality and legal capacity as may be necessary to operate effectively internationally, to enter into this Headquarters Agreement, and for the exercise of its official functions and the fulfilment of its purposes'. Article 9 of the Agreement addresses the issue of the immunity of the

[42] As resented by Anthony Aust, each MOU must be evaluated on a case-by-case basis, since its legal character depends primarily on the intention of the parties '*which must also be determined on the basis of factors other than* [its] *name, especially* [its] *wording*'; see: Anthony Aust,'The Theory and Practice of Informal International Instruments' (1986), 38 International and Comparative Law Quarterly 800ff.

[43] Robin Churchill, Geir Ulfstein (n 6) 651.

[44] UN FCCC/CP/2010/7/Add.1.

[45] UN FCCC/CP/2011/9/Add.1. For more on this, see: Yulia Yanmineva, Kati Kulovesi, *The New Framework for Climate Finance under the UN Framework Convention on Climate Change: A Breakthrough or an Empty Promise?*, in EJ Hollo, K Kulovesi, M Mehling (eds), *Climate Change and the Law* (Springer, Dordrecht, 2013) 191ff.

[46] In this decision, the COP relies on paragraphs 7 and 8 of the GCF Governing Instrument.

[47] See https://www.greenclimate.fund.

Fund and its property, and Article 8 the inviolability of its archives. The question of the privileges and immunities of the staff of the Fund is specified in Article 13.

By decision B.05/11, the Board of the GCF requested the Secretariat to seek a legal opinion from the UNOLA on the possible institutional linkages between the GCF and the UN.[48] In its opinion, the UNOLA emphasised the fact that the institutional linkage that currently exists between the UN and the UNFCCC Secretariat does not apply to the Fund. There is, moreover, no multilateral treaty establishing the GCF that provides 'for the privileges and immunities of its officials and there is no relationship agreement between the UN and the Fund'.[49]

IV. CONCLUSIONS

The results of this research support the following claim: for the implementation of certain international agreements, especially multilateral environmental agreements, States create dedicated treaty bodies with competences not only to implement these agreements but also to exercise law-making powers, including treaty-making powers. These bodies, which constitute more flexible forms of co-operation between States, are described in international environmental law as AIAs. These arrangements also exercise treaty-making powers that are largely implied. While the similarities between them and international organizations are considerable, they do not qualify as fully-fledged international organizations. They do, however, provide an example of a new form of the institutionalisation of international co-operation: as international organizations *sui generis* that retain their autonomy. They may be considered a new generation of international organization that reflects the process of synergy aimed at improving coherent implementation of environmental conventions through a wide range of co-operative activities between the arrangements.

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[48] Report on Activity of the Secretariat, Addendum, GCF/B.07/Inf.02/Add.1.

[49] ibid, Annex II: Reply from the United Nations Office of Legal Affairs dated 21 February 2014, 7ff.

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LEGAL STANDING IN ALGORITHMIC HARM CASES. COLLECTIVE ACTION IN LITIGATING RISK MODELS ACROSS E-GOVERNMENT STATES

Abstract

The paper demonstrates the cycle of access to justice in algorithmic harm cases. It analyses harm in deploying risk models in social security domains by two e-governments and compares legal standing provisions therein. Case studies have been selected from the domestic legal systems of Australia and the Netherlands. The paper concludes that as long as domestic judicial review mechanisms require demonstrating sufficient interest in the case, there are limited possibilities, if any, for the individual victims to claim algorithmic harm directly and seek access to justice. It is due to the individualistic nature of legal standing provisions vis-à-vis collective deployment of algorithmic decision-making processes. Conversely, algorithmic models can be addressed when public interest litigation is in place. However, this solution would not address an individual harm caused by the risk models but rather aim at removing the risk model from decision-making processes. Therefore, neither solution can satisfy all interests that various applicants, especially the vulnerable ones, may have in litigation.

KEYWORDS

algorithmic harm, legal standing, collective action, access to justice, risk models

SŁOWA KLUCZOWE

szkoda przez algorytmy, prawo do stawania przed sądem, pozew zbiorowy, dostęp do sprawiedliwości, modele oparte na ryzyku

1. INTRODUCTION: ALGORITHMIC HARM IN E-GOVERNMENTS

Algorithmic decision-making tools,[1] trained and tested on data collected and scraped from existing digital data sources, have contributed to organizing and facilitating our lives. For example, to ensure the efficiency of social security systems calculated from individuals' incomes, States introduce automated forms of detecting frauds. Therefore, robust reasons exist for shifting towards e-governments and augmenting the public sector with these tools. States are attracted by the promising benefits of digitalization and integrate algorithms into their decision-making processes.[2] However, the characteristics of the contemporary algorithmic decision-making processes, including contexts of deployment, have already led to harm (including through algorithmic bias and discrimination) and increasing the disadvantages already suffered by vulnerable groups based on such grounds as race, national or ethnic origin, gender, age or economic status. Among many aspects of these decision-making processes, litigations of algorithmic harm become problematic when confronted with the scale of the algorithms' deployment by e-governments and difficulties for individuals in discovering and subsequently proving that algorithmic harm took place before courts.[3] Therefore, more and more cases are emerging across e-government jurisdictions in which individuals face legal standing obstacles in litigating algorithmic harm.

Legal standing is a term used in legal procedures to describe a person or an entity who can bring a case before the relevant supervisory body. It is a legal institution through which a claimant can stand to present a case and receive a decision

[1] Algorithms are computer programs for sorting, searching, counting and classifying. Michael D'Rosario and Carlene D'Rosario, 'Beyond RoboDebt: The Future of Robotic Process Automation' (2020) 11 International Journal of Strategic Decision Sciences (IJSDS) 1, 1–2.

[2] D'Rosario and D'Rosario (n 1) 13–16; Tapani Rinta-Kahila and others, 'Algorithmic Decision-Making and System Destructiveness: A Case of Automatic Debt Recovery' (2022) 31 European Journal of Information Systems 313, 313; Geoffrey Mead and Barbara Barbosa Neves, 'Contested Delegation: Understanding Critical Public Responses to Algorithmic Decision-Making in the UK and Australia' (2023) 71 The Sociological Review 601.

[3] Cecil Abungu, 'Algorithmic Decision-Making and Discrimination in Developing Countries' (2022) 13 Journal of Law, Technology, & the Internet 39, 51.

on the merits.[4] Depending on the legal system, legal standing requires the person or entity to prove that they have their own legal or factual interest in the case (for example, harm or damage suffered, and for which a court is able by law to provide remedy). Every jurisdiction has its own procedure that shapes this institution. Regarding algorithmic harm, legal standing is affected by factors such as defining who is entitled and has necessary resources to demonstrate the legal interest. Administrative procedures aim at challenging general State practices applied towards an undetermined number of potential victims. Therefore, in administrative justice cases, unless civil society groups are involved, individuals do not have the necessary resources to access remedies in domestic procedures against a State when they are required to demonstrate an individual interest (for example, being an individually targeted victim of algorithmic harm) under domestic law in question. A claim is usually individualistic in nature and is difficult to proceed with in algorithmic harm cases that are collective in nature. Individuals would be required to establish legal standing in the case by proving that the outcome of the algorithmic decision-making process affected them individually. Therefore, a shift towards the notion of collective harm in algorithmic decision processes can have great implications on the legal standing provisions since it would challenge the traditional identification of individuals being affected by a risk model. However, this shift requires re-defining the legal standing provisions towards collective action (and not necessarily public interest litigation or *action popularis*).

Various stakeholders have sought to address the harmful effects of algorithmic decision-making tools through sectoral regulation, treaties, soft law and ethics. Nynke E Vellinga has analyzed how new EU liability rules would shape the burden of proof to tackle information asymmetries between parties in a liability claim concerning risk and loss caused by defective algorithmic tools.[5] Opposing sole reliance on data by States, Jack Maxwell has argued that judicial review performs as a powerful tool to address abuses in algorithmic decision-making processes.[6] Human rights litigation constitutes only one option among others to inhibit the social impacts of innovations.[7] The human rights-centred perspective encroaches into the litigation of opacities and malfunctions of algorithms.[8]

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[4] Stephan Kolo ßa, 'Standing (Locus Standi)', *Max Planck Encyclopedia of Comparative Constitutional Law* (2021) para 1.

[5] Nynke E Vellinga, 'Rethinking Compensation in Light of the Development of AI' [2024] International Review of Law, Computers & Technology 1.

[6] Jack Maxwell, 'Judicial Review and the Digital Welfare State in the UK and Australia' <https://papers.ssrn.com/abstract=3896200> accessed 18 April 2024.

[7] Claude Castelluccia and Daniel Le Métayer, 'Understanding Algorithmic Decision-Making: Opportunities and Challenges'. (Secretariat of the European Parliament 2019) PE 624.261 <https://data.europa.eu/doi/10.2861/536131> accessed 28 February 2023.

[8] Solon Barocas and Andrew D Selbst, 'Big Data's Disparate Impact' (2016) 104 671; Stephanie Bornstein, 'Antidiscriminatory Algorithms' (2019) 70 Alabama Law Review 519; Jenni

Against this background, the paper focuses on algorithmic harm and standing provisions as the key element for accessing justice against public bodies as the users of algorithms and, therefore, also entities against which legal action is taken. It asks whether there is a need for procedural rule changes in the context of algorithmic decision-making processes. In this vein, the paper compares two case studies – Australian and Dutch, and asks how have legal standing provisions impacted the ability of individuals to challenge risks models deployed by Australia and The Netherlands in social security systems. Social security is among the most fragile areas involving algorithmic decision-making processes in the public sector.[9] The cases in this field are evolving with the different municipal approaches available to claim harm.[10] Both States have deployed algorithmic-driven welfare enforcement systems which has raised significant social and legal controversies. They belong to advanced democracies with strong incentives for the rule of law and the protection of individuals against harms in legal procedures. However, there are significant differences throughout the jurisdictions with respect to legal standing thresholds. The normative frameworks of the selected States also impact particular strategy litigants pursue as well as judge's reasoning. These differences directly impact upon the court's decision on admissibility criteria and make it difficult to arrive at a 'one size, fits all' litigation model to address algorithmic harm. Consequently, the case studies led to different legal outcomes concerning individual algorithmic harm. This contrast will help illuminate differentiated options to procedurally address algorithmic harm in the future. This article is, therefore, not a comprehensive study but it pursues an in-depth qualitative analysis of how legal

Hakkarainen, 'Naming Something Collective Does Not Make It so: Algorithmic Discrimination and Access to Justice' (2021) 10 Internet Policy Review; Sonia K Katyal, 'Private Accountability in an Age of Artificial Intelligence' in Woodrow Barfield (ed), *The Cambridge Handbook of the Law of Algorithms* (Cambridge University Press 2020); Carsten Orwat, *Risks of Discrimination through the Use of Algorithms* (Federal Anti-Discrimination Agency 2020) <https://publikationen.bibliothek.kit.edu/1000123477> accessed 4 January 2022; Frederik J Zuiderveen Borgesius, 'Strengthening Legal Protection against Discrimination by Algorithms and Artificial Intelligence' (2020) 24 The International Journal of Human Rights 1572; Jennifer Raso, 'Implementing Digitalisation in an Administrative Justice Context' in Marc Hertogh and others (eds), *The Oxford Handbook of Administrative Justice* (Oxford University Press 2022).

[9] Pablo Jiménez Arandia, 'Algorithmic Transparency in the Public Sector' (Official Journal and PublicationsOrganisation of the Government of Catalonia 2023) Govern Obert 9 22; Maria O'Sullivan, 'Chapter 11: Artificial Intelligence and the Right to an Effective Remedy', *Artificial Intelligence and International Human Rights Law* (2024) 212.

[10] In October 2024, a new case challenging the social security risk model was filed in France. *LQDN et al v Caisses d'Allocations Familiales (Memorial)* (Conseil d'État (France)). NGOs reported on potential discriminatory impacts of digital welfare system used in Denmark. 'Denmark Faces Backlash over AI Welfare Surveillance' (*Digital Watch Observatory*, 19 November 2024) <https://dig.watch/updates/denmark-faces-backlash-over-ai-welfare-surveillance> accessed 28 November 2024.

standing provisions impacted the ability of individuals to challenge risk models deployed by the two States.

For clarity, I will use the term *'*algorithmic harm', by which I understand a harmful result on individual of algorithmic decision-making process that is not justified by law. Several challenges pertain to defining algorithmic harm vis-à-vis harm in general. Firstly, the notions of harm, victim and burden of proof are blurred. The practice of harm in algorithmic decision-making processes is difficult to capture in a legally required way by an individual victim. In contrast, 'traditional' reflections of harm have been captured through tangible and explainable actions or decisions against a particular individual. With the scale of deployment of algorithms and their non-transparent nature, detecting harmful practices against whole collectives becomes challenging. Algorithmic harm is more prone to result in collective harm, which challenges the legal standing provisions that usually require establishing a specific legal interest in a case. Additionally, the traditional paradigm of legal responsibility focuses on evaluating the human action. The use of algorithmic decision processes blurs responsibility among many actors (from designers, developers, to final users of algorithms, among others).[11] Following Tetyana (Tanya) Krupiy's argument on AI decision-making **processes***,* instead of systems, the term algorithmic decision-making **processes** will be used to catch multi-dimensional relations between an agent and an individual in legal protection schemes.[12]

This work is structured in three parts. **Results** present cases where an argument of algorithmic harm was raised at various levels of auditing the algorithmic decision-making processes under the selected jurisdictions. In **Discussion**, I explore legal standing in procedures challenging State's deployment of algorithmic decision-making processes. **Conclusions** indicate that the way in which procedures for challenging public entities' decisions is structured in domestic jurisdictions will significantly impact the ability of individuals to litigate algorithmic harm in the future. Public interest litigation may by an optimal (but not ideal) path towards litigating algorithmic harm committed by States.

[11] Xukang Wang and others, 'Algorithmic Discrimination: Examining Its Types and Regulatory Measures with Emphasis on US Legal Practices' (2024) 7 Frontiers in Artificial Intelligence; Zuiderveen Borgesius (n 8); Ignacio N Cofone, 'Algorithmic Discrimination Is an Information Problem' (2019) 70 Hastings Law Journal 1389.

[12] Tetyana (Tanya) Krupiy has argued that it is more productive in terms of inclusion, since it captures a broad range of processes that allows an understanding of how the system is structured and operates. Tetyana (Tanya) Krupiy, 'A Vulnerability Analysis: Theorising the Impact of Artificial Intelligence Decision-Making Processes on Individuals, Society and Human Diversity from a Social Justice Perspective' (2020) 38 Computer Law & Security Review 105429.

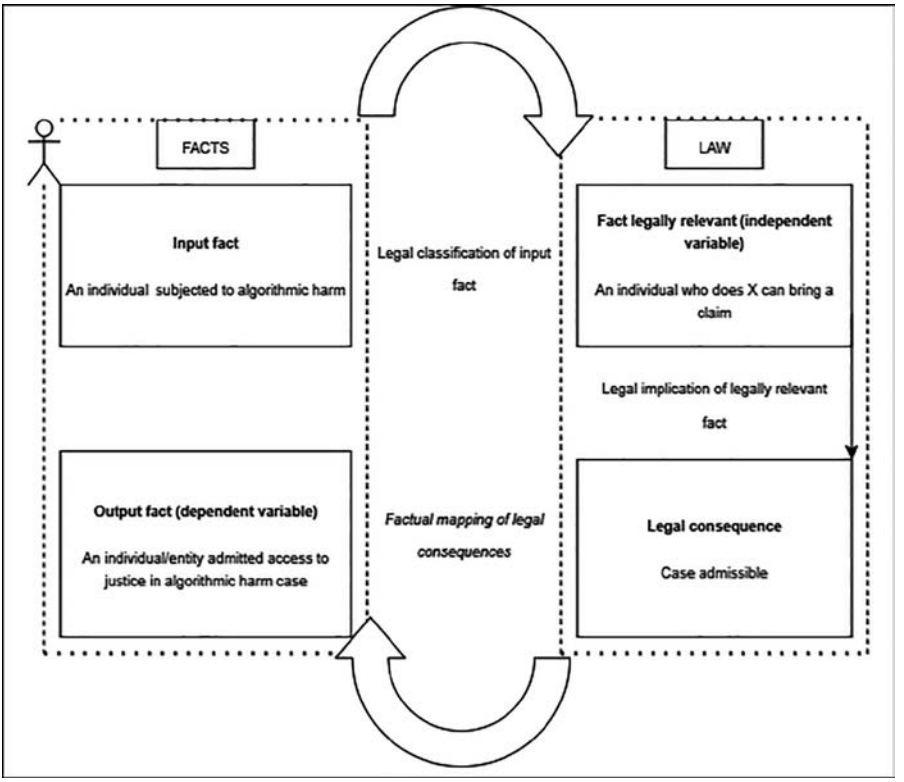

Diagram 1: A normative model for access to justice concerning legal standing in algorithmic harm cases

By utilizing a functional approach to comparative research, this study started with collecting cases concerning risk models that allegedly led to individual harm in the selected domestic jurisdictions. The functional approach applied here focused not on rules but their effects in judicial decisions as responses to the same real-life situation of algorithmic harm. The selected domestic bodies fulfil a similar function of monitoring effects of algorithmic decision-making on individuals. The aim of this functional approach to comparative study is to find a 'better-law comparison' which fulfils its access to justice function better than the others.[13] Case-law databases of the two States[14] were searched with the

[13] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2019) 342.

[14] The searched databases were: for Australia – https://www.austlii.edu.au/databases.html; for The Netherlands – https://www.rechtspraak.nl/.

following keywords: 'algorithm', 'Artificial Intelligence', 'risk model', 'fraud detection'. The results were limited to the period of 2015-2024. The cases were analyzed from the perspective of arguments used to support or reject algorithmic harm, without any prior assessments of the arguments' relevance. It allowed to induce and label three tools used during the procedure, namely: 1) legal standing; 2) burden of proof; 3) access to information. Although burden of proof and access to information have been the primary procedural obstacle to litigating algorithmic harm, both were already widely analysed in the literature.[15] To pursue an in-depth quality research and limit the scope of the paper, I selected legal standing as less widely recognised despite being an entry point for the admissibility criteria in a case.

In the diagram below, I describe the relationship between independent and dependent variables used for the functional approach to the comparative study. "X" in the independent variable refers to what an individual or an entity must demonstrate to be eligible to bring a claim in algorithmic harm case. Independent variables mean the cause of the researched phenomenon that can be manipulated to explore the effects of such manipulation (therefore, to explore dependent variables). In contrast, dependent variables mean the effect of the researched phenomenon and can change as a result of the manipulation performed on the independent variable.[16]

2. RESULTS: ADDRESSING ALGORITHMIC HARM THROUGH LEGAL STANDING

The following section presents cases from the Netherlands and Australia with the overall description of both legal standing provisions and outcomes of the case.

[15] Hilde Weerts and others, 'Algorithmic Unfairness through the Lens of EU Non-Discrimination Law', *FAccT Conference 2023* (ACM 2023) <https://hal.science/hal-04244693> accessed 28 October 2024; Jack Maxwell and Joe Tomlinson, 'Proving Algorithmic Discrimination in Government Decision-Making' [2020] Oxford University Commonwealth Law Journal <https://www.tandfonline.com/doi/abs/10.1080/14729342.2020.1833604> accessed 28 October 2024; Ljupcho Grozdanovski, 'In Search of Effectiveness and Fairness in Proving Algorithmic Discrimination in EU Law' (2021) 58 Common Market Law Review <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\COLA\COLA2021005.pdf> accessed 28 October 2024; Tambiama Madiega, 'Artificial Intelligence Liability Directive' (European Parliamentary Research Service 2023) Briefing PE 739.342 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739342/EPRS_BRI(2023)739342_EN.pdf> accessed 28 October 2024.

[16] Dr Sanvedi Rane and others, *Research Management And Methodology* (AG PUBLISHING HOUSE (AGPH Books) 2022) 78–79; John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (SAGE 2013) 52.

2.1. THE SYRI CASE (2020)

The Dutch law obliges public entities to act in accordance with higher order law that embraces the EU law and state obligations under international law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[17] and the EU General Data Protection Regulation (GDPR).[18] Since Dutch law is monistic with international law, case-law of the European Court of Human Rights binds domestic public entities. In the context of data processing, the right to respect for private life under Article 8 of the ECHR also embraces the right to equal treatment in equal cases and the right to protection against discrimination, stereotyping and stigmatization.[19] As an EU regulation, the GDPR is directly applicable and has precedence over domestic legislation in the EU Member States. Article 22 of the GDPR contains the right of an individual not to be subjected to a decision based solely on automated processing which produces legal effects concerning them or similarly significantly affects them. Article 24 of the GDPR sets an obligation for data controllers to take account of the risks of varying severity for the rights and freedoms of natural persons when processing data. The Guidelines on Automatic individual decision making and profiling for the purposes of the GDPR explain that, for data processing, to significantly affect someone, the effects must be sufficiently great or important to be worthy of attention, including excluding or discriminating individuals.[20]

The procedure allows individuals to directly rely on the ECHR before domestic courts. Legal standing depends on establishing an interest in the outcome of the proceedings. Legal standing for individuals and civil society groups is regulated in Book 3 of the Dutch Civil Code. According to S. 303 of the code, 'without sufficient interest no one has a right of action'. In case of data processing, an individual must, therefore, prove or make a plausible case for a sufficient concrete and personal interest in the case, and demonstrate the existence of a possible concrete connection between his or her private life, including possibly his or her

[17] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, adopted 4 November 1950, entered into force 3 September 1953 [213 UNTS 221].

[18] Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 [Official Journal of the European Union L 119/1].

[19] *S and Marper v the United Kingdom* [2008] ECtHR [GC] 30562/04, 30566/04.

[20] 'Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679 (Wp251rev.01)' (The Working Party on the Protection of Individuals with regard to the Processing of Personal Data 2017) <https://ec.europa.eu/newsroom/article29/items/612053> accessed 27 November 2024.

professional activity and data processing. Book 3 Section 305a of the Dutch Civil Code enables civil society interest groups to bring claims against public entities. It states that 'a foundation or association with full legal capacity can institute legal proceedings aimed at protecting similar interests of other persons, insofar as it represents these interests in accordance with its articles of association and these interests are sufficiently safeguarded'.[21]

The case *NJCM et al. v De Staat der Nederlanden*[22] by The Hague District Court concerned the System Risicoindicatie (SyRI). SyRI was a legal instrument and technical infrastructure used by the Dutch government in cooperation with certain government bodies to prevent and combat fraud in social security, income-dependent schemes, taxes and labour laws. It relied on a risk model covering predominantly 'problem districts' – areas with higher concentrations of vulnerable groups – to detect the risk of irregularities. Data was linked and analyzed anonymously in a secure environment to generate risk reports. The system generated risk reports about individuals that could result in further investigations by a human. The reports were kept for two years, and individuals were not informed once the report about them was generated, nor did they have any insight into how the system made a decision. Several NGOs and two Dutch citizens submitted claims to The Hague District Court. The claims challenged the government's use of SyRI under Article 8 of the ECHR. In this case, the court considered the interplay between three frameworks that could address the public use of algorithmic decision-making processes: data protection law, human rights law, as well as accountability and the transparency of algorithmic decision-making.[23]

Even though the court admitted the NGOs as having a legal interest in bringing proceedings (a unique support base of individuals or groups whose human rights have been violated as acting in the public interest, which is allowed in the Dutch Civil Code), it refused to consider the same claims brought by the two individuals. Their legal standing was denied due to insufficient demonstration of a concrete and personal interest.[24]

[21] Burgerlijk Wetboek Boek 3 1992.

[22] *NJCM c.s v De Staat der Nederlanden (SyRI), Judgment* [2020] The Hague District Court ECLI:NL:RBDHA:2020:1878.

[23] These are also frameworks that equipped both parties to a case with specific tools to address their claims. Marvin van Bekkum and Frederik Zuiderveen Borgesius, 'Digital Welfare Fraud Detection and the Dutch SyRI Judgment' (2021) 23 European Journal of Social Security 323.

[24] The court would expect the two individuals to have demonstrated 'concrete reference points from which it may have been followed that data pertaining to them form part of processing in SyRI' (para 6.15).

2.2. *PRYGODICZ ET AL. V COMMONWEALTH* OF AUSTRALIA (2021)

Class actions against public entities are allowed under the Australian law based on Part IVA of the Federal Court of Australia Act. S. 33D of the act states that a person 'who has sufficient interest to commence a proceeding on his or her behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons'.[25] S. 33C1(a)-(c) of the act further sets forth the legal standing of (at least 7) persons who 'bring a claim against the same person, provided that the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and the claims of all those persons give rise to a substantial common issue of law or fact'. For social security claims, actions can be brought on unjust enrichment or a common law tort in negligence for damages. The unjust enrichment claim relies on the defendant having received enrichment without lawful basis when an applicant paid the defendant a mistaken payment and/or the payment was made by compulsion or duress under colour of statutory power and authority. A negligence claim is based on a defendant's breach of duty of care to an applicant who, as a result, suffered loss and damage. The common law tort claim can embrace economic loss and distress damages for associated stress, anxiety and stigma.

The Commonwealth of Australia deployed an automated debt-collection system to recover social security payments that had been overpaid, called Robodebt (Social Security Debt Collection). By deploying data matching, the system was calculating and sending a report – without meaningful human intervention – to individuals claiming that there was a difference between the income information obtained from the Australian Taxation Office and that used by an app called Centrelink. Robodebt wrongly identified individuals, which, given the scale of deployment, led to systematic errors in calculations. The risk model disproportionately impacted indigenous people, the elderly, and people with disabilities.[26] In this case, a lack of understanding and transparency played a pivotal role in Robodebt's failure, since individuals could not access and understand how the system calculated them as risk individuals.[27]

[25] Federal Court of Australia Act 1976 (Cth).

[26] All of these groups belong to those usually more dependent on welfare care. Tapani Rinta-Kahila and others, 'Managing Unintended Consequences of Algorithmic Decision-Making: The Case of Robodebt' [2023] Journal of Information Technology Teaching Cases 20438869231165538, 3; Samuel Naylor, 'Robodebt, Kafka and Institutional Absurdism in Australia' (2023) 48 Alternative Law Journal 299, 301.

[27] In terms of transparency, in particular, publicly available error rates in the applied calculating method were not available. Yee-Fui Ng, Maria O'Sullivan and Moira Paterson, 'Revitalising

Based on two claims of unjustified enrichment and a common law tort in negligence for damages, a class action lawsuit was filed in 2019 by a law firm on behalf of six applicants and other registered lawsuit members. Because of the unavailable litigation funding, the law firm filed the case on a no-win, no-fee basis.

The Commonwealth of Australia admitted that no proper legal basis existed to raise, demand or recover asserted debts. It raised a defence of a 'juristic reason' to retain enrichment and deny restitution for the applicants or group members. The juristic reason relied on the presumption that the defendant believed that these recovered amounts were, in fact, owed by the individuals under other debts to the Commonwealth. According to the defendant, once the juristic reason was raised, the applicants had to prove the basis for retention. The court dismissed the defence by concluding that it was up to the defendant to prove the existence of these alleged debts and that retention was not unjust (para 151 and 153 of the Reasons for judgment). The design of Robodebt was flawed, since it relied on a presumption that all individuals had a stable or constant income. By contrast, many social security recipients did not have a stable wage (Robodebt's assessment relied on fortnightly income), and were part-time, sessional or intermittent employees.[28] The deployment context was also challenging because many reported individuals experienced not only financial hardship, but also anxiety, distress, and even suicide. The legal standing was determined by the class action nature of the lawsuit. It required that the claims were made, or could be made, against a defendant by all those in the groups identified in the proceeding (para 129 of the Reasons for judgment).

3. DISCUSSION: BETWEEN ACCESS TO JUSTICE AND LEGAL STANDING IN LITIGATING ALGORITHMIC HARM

In both cases, there were at least two groups of subjects whose ability to stand before a court became relevant for the final outcome, namely 1) affected individuals, and 2) civil society groups. In cases of widespread harm facilitated by algorithms, the role of civil society groups is entirely different from the aim individuals may have in the procedure. For the former, it is usually easier to demonstrate

Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43 UNSW Law Journal 1068–69.

[28] Dennis Trewin, Nicholas Fisher and Noel Cressie, 'The Robodebt Tragedy' (2023) 20 Significance 18.

legal standing in cases falling into the category of general public interest (where domestic law allows for *actio popularis* or representing affected groups in collective actions) vis-à-vis State actions that involve mass groups of individual victims.

In the case of Robodebt, in order to challenge the risk model and receive remedies, individual victims decided to raise claims of unjust enrichment and negligence resulting from vulnerability based on their economic situation and had to prove the inflicted tangible harm (financial loss).[29] This independent variable was further supported by the legal representation by a law firm on a no-win no-fee basis. Therefore, identifying victims for unjust enrichment purposes was easier because the victims had experienced an abuse of their vulnerability and a tangible (financial) loss as well as could utilise the legal aid without necessarily paying costs of the case. Class actions is a path to access justice by individuals themselves when they unite to challenge decisions made by public entities. Even though the purpose of this process could be focused on revealing truth about the algorithmic decision-making process, it is primarily focused on accessing remedies for the algorithmic harm. Additionally, the involvement of the law company on a no-win no-fee basis (such as demonstrated in the Robodebt case) can be vital for individuals to challenge public entities' decisions and reduce information and resource asymmetries. As noted by the court in the Robodebt, filing a case on such basis due to limited or unavailable litigation funding enabled victims to access justice.

In SyRI, individuals were denied legal standing for data protection violations but NGOs were not. However, the procedure did not aim at paying compensation to victims but rather at removing the SyRI's deployment from the legal procedures. This strategy shaped the independent variable, namely public interest litigation, and the dependent variable (access to justice) was affected by it. The engagement of NGOs in public interest litigation was focused on annulling the risk model rather than seeking justice for individual victims (who were denied legal standing) in their own name. *Actio popularis* enables certain entities to bring cases, without necessarily having identifiable individual victims, to a court in the public interest. NGOs serve a wider interest and engage in cases of collective harm to represent the common good on their behalf. Their actions can produce positive results for everyone (and not for single identifiable victims) and safeguard future algorithmic decision-making processes that public entities would like to deploy. The consequence is naturally to determine what the common good is in the specific case.

[29] The notion of vulnerability is broader than discrimination. Paolo De Stefani has argued that 'compared with the human rights language, "vulnerability" better articulates the relationship between legal categories and rapidly changing social and ecological landscapes.' Paolo De Stefani, 'Conceptualizing "Vulnerability" in the European Legal Space: Mixed Migration Flows and Human Trafficking as a Test' (2022) 4 Frontiers in Human Dynamics.

Public entities may argue that deploying an algorithmic decision-making system is crucial to protect collective interests of the whole State population. However, the collective interests of the State cannot fully justify the resulting algorithmic harms. The role of NGOs is, therefore, to assist public entities in demonstrating that these collective interests should be integrated with reducing or preventing algorithmic harms.

Introducing or utilizing a more open legal standing rules or opening up to free legal aid would remedy the obstacles individuals face when litigating risk models against States. Not every victim of algorithmic harm can file a complaint on their own since litigation is usually a long, expensive and expert-based process with no guarantee of winning. The limited resources individuals possess are particularly problematic when confronted with public entities in the procedure. Public entities usually have access to the whole picture of algorithmic decision-making processes, financial resources and experts.

Therefore, the engagement of meaningful civil society representatives remains crucial for detecting and bringing the case of algorithmic harm and, more broadly, for remedying information and power asymmetries. When the position of NGOs is weak (especially in developing or authoritarian States), members of NGOs are repressed, or NGOs have limited (legal, human, and financial) resources, a claim of algorithmic harm and defence of affected groups would be extremely difficult to raise.[30] The engagement of NGOs in litigating algorithmic harm can support legal mobilization processes in which individuals or entities invoke legal norms and arguments to influence mass-scale State conduct. This may explain why, for example, the EU anti-discrimination directives include an obligation to encourage dialogue with NGOs that have a legitimate interest in contributing to the fight against discrimination.[31] This legal mobilization of NGOs that are recognized partners in social, political and economic processes concerning algorithmic discrimination may, therefore, be aimed at annulling or modifying the algorithmic decision-making process.[32] However, the diverse applications of algorithmic decision-making processes heavily impact the mandate and potential legal standing of particular NGOs in litigation. This diversion requires NGOs

[30] Mark Aspinwall, 'Legal Mobilization without Resources? How Civil Society Organizations Generate and Share Alternative Resources in Vulnerable Communities' (2021) 48 Journal of Law and Society 202.

[31] For example, Council Directive 2000/43/E.C. of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin 2000, Vol 43, Article 12; Lejeune and Ringelheim 2022, 7.

[32] Aude Lejeune and Julie Ringelheim, 'The Differential Use of Litigation by NGOs: A Case Study on Antidiscrimination Legal Mobilization in Belgium' (2022) 48 Law & Social Inquiry 1, 2–4, 28; Maranke Wieringa, '"Hey SyRI, Tell Me about Algorithmic Accountability": Lessons from a Landmark Case' (2023) 5 Data & Policy e2, 15.

to specialize in particular types of litigation concerning algorithms, including developing the necessary technological expertise.

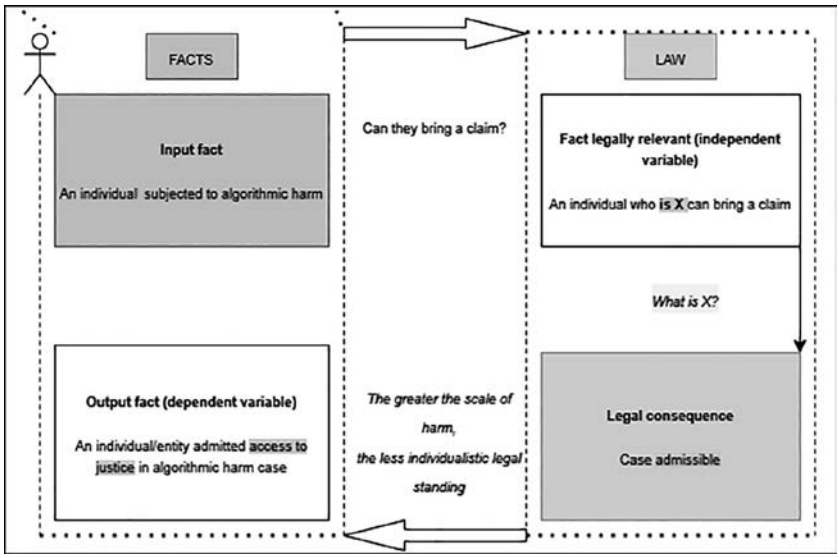

Diagram 2: An optimal shape of legal standing to litigate algorithmic harm.

Additionally, when reflecting on the obstacles to legal standing, Anne L. Washington notes that, once classified in an algorithmic decision-making process, individuals struggle significantly with re-negotiating their identities,[33] particularly concerning false positives (a person is mistakenly classified as falling into a risk group) as well as errors and data correlations to protected characteristics.[34] They become no longer socially, but system-classified individuals who only share similar (but not all) attributes or characteristics to the general population of fraudsters.[35] Risk models are tested and trained in cross-cultural and group-based

[33] Anne L Washington, 'How to Argue with an Algorithm: Lessons from the COMPAS-ProPublica Debate' (2018) 17 Colorado Technology Law Journal 131.

[34] Villasenor and Foggo 'Artificial Intelligence, Due Process and Criminal Sentencing' (2020) 2020 Michigan State Law Review 295, 332; Sascha van Schendel, 'The Challenges of Risk Profiling Used by Law Enforcement: Examining the Cases of COMPAS and SyRI' in Leonie Reins (ed), *Regulating New Technologies in Uncertain Times* (TMC Asser Press 2019) 233–234.

[35] Paz Peña and Joana Varon, 'Decolonising AI: A Transfeminist Approach to Data and Social Justice' in Association for Progressive Communications, Article 19 and Swedish International Developmeny Cooperation Agency, *Artificial intelligence: Human rights, social justice and development* (Global Information Society Watch 2019) 31 <https://giswatch.org/2019-artificial-intelligence-human-rights-social-justice-and-development> accessed 13 May 2022; Gideon Christian, 'Legal Framework For The Use Of Artificial Intelligence (AI) Technology In The Canadian Criminal Justice System' 18 <https://papers.ssrn.com/abstract=4712508> accessed 10 April 2024; Eva

contexts, which can make them unreliable with specific variables describing individuals because psychological constructs may vary between groups.[36] Furthermore, algorithmic harm differs from other forms of harms in creating collectives that are not yet recognized by the law, leading to new forms of harm, including intersectional discrimination when an individual is simultaneously discriminated against on multiple grounds. For example, Paz Peña and Joana Varon have revealed some common grounds multiplying the challenges of algorithmic decision-making processes in Latin America, namely the significant number of indigenous peoples, migrant populations and poor people. According to Jenni Hakkarainen, algorithms create a distance between a victim and a perpetrator, complicating the litigation of harms, such as human rights violations. She has suggested that protection against algorithmic harm should not focus solely on individual complaints, but on *ex-ante* actions, including the availability of collective action.[37]

To conclude, due to the difficulties in challenging the category to which an individual victim has been classified, collective procedures are much more conducive to bringing algorithmic harm cases before a court than individual cases are. An open legal standing provision would not remedy all the challenges faced by victims of algorithmic harm though. It could mainly reduce or eliminate the algorithmic decision-making process without necessarily addressing individual harms. Therefore, legal systems that have sufficiently flexible and open rules on legal standing are better suited to a move towards an e-government mainly because of the massive scale of algorithmic decision-making processes vis-à-vis the individualistic nature of harm. The diagram above summarizes the findings with X being the availability of legal standing based on the collective action.

4. CONCLUSIONS

Public scrutiny over algorithmic decision-making processes demonstrates the relevance of thorough analysis for an e-government attracted by new technologies. The contexts of deploying algorithmic decision-making processes become

Schmidt, Andreas Sesing-Wagenpfeil and Maximilian A Köhl, 'Bare Statistical Evidence and the Legitimacy of Software-Based Judicial Decisions' (2023) 201 Synthese 134, 134.

[36] Leticia Gutierrez, 'Walls of Red Wing: An Examination of Culturally-Informed Sentencing, Risk/Need Factors, and Treatment for Peoples of Indigenous Heritage in Canada's Criminal Justice System' (Carleton University 2018) 230–231; Christian (n 37) 16. Andrew Haag and others, 'An Introduction to the Issues of Cross-Cultural Assessment Inspired by Ewert v Canada' (2016) 3 Journal of Threat Assessment and Management 65, 66.

[37] Hakkarainen (n 8) 4, 7, 18.

problematic when public authorities use algorithmic decision-making systems on a mass scale to produce tangible consequences for the addressees of these processes. This paper sought for clarifying legal standing provisions in two jurisdictions that decided to deploy the algorithmic decision-making process in social security domains. The lack of protection against algorithmic harm could result from the shape of the procedure in domestic litigation of risk models. The protection against algorithmic harm is affected by the shape of domestic procedures that can be hardly utilized to address mass scale deployment of risk models. Given the peculiar features of algorithmic decision-making processes, individuals would face significant difficulties in meeting the procedural thresholds for challenging risk models deployed by public entities. Legal standing forming a part of access to justice is a prerequisite for an individual to enforce their protection against algorithmic harm. If legal standing provisions were open towards collective action, the individual negative effects of deploying risk models could be better addressed.

Further research is needed to develop a review model for an algorithmic harm claim that addresses the equality of parties and access to justice more broadly. With the increasing move towards e-governments, it would strengthen the protection of individuals against algorithmic harm. In this context, civil society and academia provide necessary safeguards (including direct involvement in litigation to support providing feedback on the social effects of algorithmic decision-making processes) and early warning mechanisms that support victims of algorithmic harm and mitigate harmful State practices.

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LIST OF LEGISLATION

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, adopted 4 November 1950, entered into force 3 September 1953 [213 UNTS 221]

Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 [Official Journal of the European Union L 119/1]

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ARTICULATING CONTRACTUAL GOOD FAITH: THE EVOLVING CIVIL AND COMMON LAW DIMENSION

Abstract

While the operation of contract law tends to be appreciated through its inherent twofold rationale, informed by autonomy and institutional standards, recurring concerns arise around the ratio of certainty to fairness in contractual transactions. In critically weighing the contract-law commitments to both autonomy- and policy-oriented normative values, a particular regard is given to the recent focus on good faith obligations in common law jurisdictions. Specifically, of notable importance is how considerations of good faith have developed over the last decade in Australia, Canada as well as England and Wales. Yet, the approach to and the degree of acceptance of good faith in commercial contexts in either jurisdiction diverge – ranging from industry-specific statutory regulation articulating good faith and relational contracts, through the recognition of a general organising principle of good faith, to the engagement with implied duties of good faith. In order to capture the potentialities of these developments to influence contract law in terms of enhancing commercial morality, it is necessary to investigate them from a combined civil–common law perspective. On the one hand, the civilian conceptualisations of good faith have arguably impinged upon the way in which the notion evolves in the common law of contract. On the other hand, the departure from the nineteenth-century classical paradigm of the Anglo-American contract law is parallelised with what symptomises the process of decodification in civil law systems. And on this basis, in view of the growing weight of the jurisprudential component of contract law, the common law's manner of reasoning appears likely to affect continental contract laws under decodification. Within

such an intertwined context, critical insights are offered into the role for and the valences of the currently evolving good faith obligations in policing commercial contracts.

KEYWORDS

contract law, good faith, civil law, common law

SŁOWA KLUCZOWE

prawo umów, dobra wiara, *civil law*, *common law*

I. INTRODUCTION

What arguably characterises contract law as a rules-based structure governing commercial transactions is its ever-evolving nature.[1] This derives from an implicit engagement of contract law with the actuality and changing modes of transacting.[2] Yet, it is through its inherent rationales that the contract law's dynamics is sought to be captured and appraised. An account shared across jurisdictions,[3] the regulation of transactions is driven by a combination of a range of normative factors.[4] Specifically, in defining the determinants of legal developments in the area of contracts, the primary focus is on a balancing of internal tensions within contract law between its underlying values and norms.[5] Among the competing norms entailing such tensions, the dichotomy of freedom of contract and certainty versus fairness and justice appears to be foregrounded.[6] Viewed in

[1] Larry A DiMatteo, *Principles of Contract Law and Theory* (Edward Elgar Publishing 2023) *xvii*. See also Ryan Catterwell, 'Autonomy and Institutionalism in the Law of Contract' (2022) 42(4) Oxford Journal of Legal Studies 1067.

[2] Roger Brownsword, Rob AJ van Gestel and Hans-W Micklitz, 'Introduction – Contract and Regulation: Changing Paradigms' in Roger Brownsword, Rob AJ van Gestel and Hans-W Micklitz (eds), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar Publishing 2017) 1; DiMatteo (n 1) 59.

[3] This is inasmuch as contract law varies in a number of respects in each legal tradition. See Mariana Pargendler, 'The Role of the State in Contract Law: The Common-Civil Law Divide' (2018) 43(1) The Yale Journal of International Law 143.

[4] Catterwell (n 1) 1072. See also Jessica Viven-Wilksch, 'The Importance of Being Relational: Comparative Reflections on Relational Contracts in Australia and the United Kingdom' (2022) 73(AD2) Northern Ireland Legal Quarterly 94, 98, 102–7.

[5] DiMatteo (n 1) 58.

[6] ibid 68, 74; Catterwell (n 1) 1067, 1072; Rebecca Stone, 'Putting Freedom of Contract in its Place' (2024) 16(1) Journal of Legal Analysis 94; Aditi Bagchi, 'Contract as Exchange' (2025) 113

this light, contract law involves, and is informed by, both autonomy-oriented and policy-oriented, non-autonomy normative values.[7]

While this twofold rationale remains central to policing contracts, recurring concerns arise around the ratio of certainty to fairness in commercial transactions. An instantiation of and a significant contribution to the ongoing debate is the recent critical focus on good faith obligations in common law jurisdictions. Of notable importance is how considerations of good faith have developed over the last decade in Australia, Canada as well as England and Wales. Still, the formulation and degree of acceptance of good faith in commercial contexts in either jurisdiction diverge – ranging from industry-specific statutory regulation articulating good faith and relational contracts, through the recognition of a general organising principle of good faith, to the engagement with implied terms of good faith.[8] Given the common law's classically restrictive approach to good faith,[9] the apparent move towards its acknowledgement in the several jurisdictions reflects a shift in relevance within the yet prevalent individualistic position into a more flexible and axiologically informed standards-based framing.

In order to draw in-depth, generalisable insights into the potentialities of these developments to influence contract law in terms of enhancing commercial morality, they need to be investigated from a combined civil–common law perspective. On the one hand, the civilian conceptualisations of good faith have arguably impinged upon the way in which the notion evolves in the common

California Law Review (forthcoming). See also Bill Dixon, 'Common Law Obligations of Good Faith in Australian Commercial Contracts – a Relational Recipe' (2005) 33(2) Australian Business Law Review 87.

[7] See Catherine Mitchell, 'The Common Law of Contract: Essential or Expendable?' in Andrew Johnston and Lorraine Talbot (eds), *Great Debates in Commercial and Corporate Law* (Red Globe Press 2020) 21, 41; Catterwell (n 1) 1069.

[8] For a general overview of the recently emerging good faith models in the common law of contract, see Magda Raczynska, 'Good Faiths and Contract Terms' in Paul S Davies and Magda Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart Publishing 2020); Viven-Wilksch (n 4) 94–124; Jan Halberda, 'Winds of Change in Common Law Jurisdictions: The Concept of Good Faith and Fair Dealing in the Performance of Contracts' in Cerian Griffiths and Łukasz Jan Korporowicz (eds), *English Law, the Legal Profession, and Colonialism: Histories, Parallels, and Influences* (Routledge 2024).

[9] See generally Pargendler (n 3) 152; Raczynska (n 8) 65, 87–88; Paul S Davies, 'Excluding Good Faith and Restricting Discretion' in Paul S Davies and Magda Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart Publishing 2020); Paula Giliker, 'Contract Negotiations and the Common Law: A Move to Good Faith in Commercial Contracting?' (2022) 43 Liverpool Law Review 175; John Cartwright, 'Good Faith in English Contract Law: Lessons from Comparative Law?' in Edwin Peel and Rebecca Probert (eds), *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (Oxford University Press 2023) 28.

law of contract.[10] On the other hand, at a broader level, the departure from the nineteenth-century classical paradigm of the Anglo-American contract law is parallelised with what symptomises the process of decodification in civil law systems. And on this basis, in view of the growing weight of the jurisprudential component of contract law, the common law's manner of reasoning appears likely to affect continental contract laws under decodification.[11]

The aim of this article is to explore the role for and the valences of the currently evolving good faith obligations in policing commercial contracts while contextualising them within the intertwined dimension of civil and common law. Employing such a complex perspective is intended to emphasise the implications of how various normative and axiological accounts of commercial contract law interrelate and thereby concretise the premises underlying good faith contracting. The initial section exposes the recent legal developments in good faith in common law jurisdictions. The focus is on the manner and extent in which the civil law constructs contribute to shaping good faith obligations within the Anglo-Saxon legal framing. In the next section, an extended context of the civil–common law interrelations is demonstrated through the parallel strands of divergence from twofold nineteenth-century paradigms in contract laws. This shows that the jurisprudential constituent of the law of contract is becoming more prominent. Thus, the last section examines the ramifications of a jurisprudentially oriented understanding of contract regulation in both civil law and common law, by centring attention on the most problematised areas of contracting which involve obligations of good faith.

II. GOOD FAITH-RELATED INNOVATIONS IN COMMON LAW JURISDICTIONS: AN OVERVIEW

A cross-jurisdictional perspective is of special pertinence to the enquiry into the intricacies of the recent developments in contract-law good faith. On that

[10] Bogna Kaczorowska, 'Zależności między dorobkiem kontynentalnego prawa prywatnego a common law na przykładzie kryterium dobrej wiary w dziedzinie umów zobowiązaniowych' (2021) 89 Studia Iuridica 125.

[11] Wojciech Dajczak, 'Amerykańska zapowiedź "śmierci umowy" na tle tradycji romanistycznej' in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego: Szkice do portretu* (Wydawnictwo Sejmowe 2017) 89, 101–2; Franciszek Longchamps de Bérier, 'Decodification of Contract Law' in Chen Su, Franciszek Longchamps de Bérier and Piotr Grzebyk (eds), *Theory and Practice of Codification: The Chinese and Polish Perspectives* (Social Sciences Academic Press 2019) 145–8 ('Decodification of Contract Law'); Franciszek Longchamps de Bérier, 'Common law a dekodyfikacja i globalizacja prawa' in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego w europejskiej tradycji prawnej* (Wydawnictwo Uniwersytetu Jagiellońskiego 2019) 27, 47–51 ('Common law').

premise, the emerging innovations within the common law jurisdictions can be appreciated against the backdrop of the approaches under the civilian legal systems. Dichotomising between civil and common law refers here to the general characteristics of the two legal traditions and their intrinsic discourse and reasoning.[12] In these terms, the civilian tradition covers legal systems that trace their origins to Roman law, whereas the common law tradition – those historically deriving from English law.[13] As far as the sources of law are concerned, the legal authority in the civil law systems is provided by a structured set of general rules of law.[14] However, while the codification is perceived to be characteristic of the modern civilian tradition, it is argued that the centrality of the civil code does not cause but rather follows from the inherent civilian outlook.[15] At the same time, a common law system, in a wider sense,[16] is identified as judge-made law whereby the legal rules are found in the decisions of the courts, and not in any legislative enactment.[17] Importantly, most of the core general rules of contract law

[12] See Longchamps de Bérier, 'Common law' (n 11) 26; Lionel Smith, 'Civil and Common Law' in Andrew S Gold and others (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2021); John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2023) 3–15.

[13] Longchamps de Bérier, 'Common law' (n 11) 26; Smith (n 12) 228; Cartwright (n 12) 3, 9, 13. See also Martin A Hogg, 'Codification of Private Law: Scots Law at the Crossroads of Common and Civil Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) 107.

[14] Cartwright (n 12) 16. See also Eva Steiner, 'Challenging (Again) the Undemocratic Form of the Common Law: Codification as a Method of Making the Law Accessible to Citizens' (2020) 31(1) King's Law Journal 27.

[15] Smith (n 12) 227–8. See also Franciszek Longchamps de Bérier, 'Evolution of Roman law' in Wojciech Załuski, Sacha Bourgeois-Gironde and Adam Dyrda (eds), *Research Handbook on Legal Evolution* (Edward Elgar Publishing 2024). This point is going to be discussed further in section III below exploring the process of decodification in contract law.

[16] In a narrow sense, common law is contrasted with equity. Historically, the dichotomy denotes the two principal sources of rules and remedies coexisting in the judge-made law of England. Within this distinction, common law is understood as the law found in the line of modern developments from old decisions of the King's courts – a particular group of courts which were established in England from the twelfth century. A jurisdiction separate from the common law courts, the courts of equity, evolved from the late fourteenth century. In several common law jurisdictions, major law reforms were initiated in the late nineteenth century to assimilate common law and equity courts, and their respective procedures. This led to the emergence of a single new court structure with the form of superior court now typical in common law jurisdictions. Under the reformed modern court structure, both the rules of common law and equity continue to be developed and applied. See PG Turner, 'Fusion and Theories of Equity in Common Law Systems' in John CP Goldberg, Henry E Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge University Press 2019) 1; Cartwright (n 12) 3, 5–9; Julius AW Grower, 'Contract | Equity' in William Day and Julius Grower (eds), *Borderlines in Private Law* (Oxford University Press 2024).

[17] Cartwright (n 12) 3–5, 13–14, 16–21.

in common law jurisdictions are based in the case-law.[18] Nevertheless, legislative intervention that changes or adds to the common law rules of contract is not without consequence.[19] Broadly, the emerging approaches to good faith in contract across common law jurisdictions represent diverse positions from cautious, yet much questionable, judicial articulation to attempts at direct recognition in statutory instruments. A deeper apprehension of their complexity and underpinnings is contingent on taking the confrontation with civilian good faith as the point of departure.

Conceptualised and operating in the Roman legal discourse since third century BC, good faith envisaged the characteristics of honesty and fidelity.[20] With a prominent contribution of the peregrine praetor to developing the legal concept of *bona fides*, the Roman law of contract was modernised through the introduction of the *ex fide bona* clause, empowering the judge to apply his equitable discretion.[21] In the classic period, the Roman jurists' engagement with explicating good faith gave emphasis to pre-legal fundamental values, whose content – informed mostly by Stoicism – was synthesised in the Ulpian's *praecepta iuris*: *honeste vivere*, *alterum non laedere*, *suum cuique tribuere*.[22] The classic perception of *bona fides* was embraced by Roman law of the Christian period, and in the late Middle Ages became a principle of the *lex mercatoria*.[23] The nineteenth-century codifications enshrined good faith, while seeking to reconcile it with legal certainty.[24] Crucially, the development and refinement of the content and scope of the

[18] ibid 4–5.

[19] ibid.

[20] Wojciech Dajczak, 'Zobowiązania' in Wojciech Dajczak, Tomasz Giaro and Franciszek Longchamps de Bérier, *Prawo rzymskie: U podstaw prawa prywatnego* (Wydawnictwo Naukowe PWN 2018) 463, 527. See also Daniele Bertolini, 'Decomposing *Bhasin v Hrynew*: Towards an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance' (2017) 67(3) University of Toronto Law Journal 348, 351–2, 381–91; Anthony Gray, *Good Faith and Relational Contracts: Theory, Practice and Future Developments* (Hart Publishing 2024) 4–13.

[21] Wojciech Dajczak, *Dobra wiara jako symbol europejskiej tożsamości prawa* (Drukarnia i Księgarnia Świętego Wojciecha 2006) 7–9; Dajczak (n 20) 527; Bertolini (n 20) 251–2, 381–2, 382–8.

[22] Dajczak (n 21) 8–11; Dajczak (n 20) 527–8.

[23] Dajczak (n 20) 528; Richard RW Brooks, 'Good Faith in Contractual Exchanges' in Andrew S Gold and others (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2020) 497, 497; Cartwright (n 9) 27.

[24] Dajczak (n 20) 528–9; Pargendler (n 3) 150–1; Jonathan Ainslie, 'Good Faith and Relational Contracts: A Scots-Roman Perspective' (2022) 26(1) Edinburgh Law Review 29, 30–1. Importantly, an extensive explication of good faith in normative terms was provided under the no-longer-in-force Polish Code of Obligations of 1933 – *Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań* (Decree of the President of the Republic of Poland of 27 October 1933 – Code of Obligations) (Journal of Laws No 82 item 598, as amended).

good faith principle in the modern codified civil law systems have translated into a diversity of normative accounts.[25] Insofar as the expansive approach to good faith in contract is what arguably distinguishes the civilian legal tradition from the largely restrictive common law position,[26] the focus now falls on the recent shifts in the latter, as exemplified by Australia, Canada, and England and Wales. These involve a diverse range of legal developments, whereby the concept of good faith in contract performance has been gaining critical attention, mostly over the last decade, across common law jurisdictions. Yet, they are viewed in a broader context of the common law's historical instantiations of good faith duties in contract performance.[27] To the extent that the evolving approaches to good faith vary among the respective laws of contract, a consequential aspect of these innovations is how they are affected by the civilian conceptualisations of good faith, and how the comparative perspective embracing Commonwealth and American laws, aside from international instruments, features in the gradual recognition of good faith in common law jurisdictions.[28]

The interwar Polish codification was based on an eruditely applied, advanced comparative method based on a sovereign investigation into foreign legislations, see Wojciech Dajczak, 'Kodeks zobowiązań jako lekcja metody prawnoporównawczej' (2014) 23(4) Kwartalnik Prawa Prywatnego 829. This point is going to be discussed further in section IV below.

[25] Cartwright (n 9) 27–8. See also, generally, Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000); Dajczak (n 20) 528–9.

[26] Pargendler (n 3) 145–6, 150–2. See also Giliker (n 9) 176; Cartwright (n 12) 11, 66–70; Halberda (n 8) 235; Christina Perry, *Good Faith in Contract Law* (Edward Elgar Publishing 2024) 188–9.

[27] This is illustrated by the eighteen-century cases: *Carter v Boehm* (1766) 3 Burr 1905, 1910; *Boone v Eyre* (1777) 126 Eng Rep 160. See Mindy Chen-Wishart and Victoria Dixon, 'Good Faith in English Contract Law: A Humble "3 by 4" Approach' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume I* (Oxford University Press 2020) 187; Lorna Richardson, 'Good Faith and the Duty to Co-operate in Long-term Contracts' in Andrew Hutchison and Franziska Myburgh (eds), *Research Handbook on International Commercial Contracts* (Edward Elgar Publishing 2020) 36; Daniel Markovits, 'Good Faith as Contract's Core Value' in Stefan Grundmann and Mateusz Grochowski (eds), *European Contract Law and the Creation of Norms* (Intersentia 2021) 47; Raczynska (8) 81; David Campbell, *Contractual Relations: A Contribution to the Critique of the Classical Law of Contract* (Oxford University Press 2022) 146; Cartwright (n 9) 31; Halberda (n 8) 237; George Leggatt, 'The Emerging Concept of a Relational Contract in English Law' in Maren Heidemann (ed) *The Transformation of Private Law – Principles of Contract and Tort as European and International Law: A Liber Amicorum for Mads Andenas* (Springer 2024) 455–6.

[28] Halberda (n 8) 236, 250–3. See also Therese Wilson, 'The Challenges of Good Faith in Contract Law Codification' in Mary Keyes and Therese Wilson (eds), *Codifying Contract Law: International and Consumer Law Perspectives* (Routledge 2014); Ewan McKendrick, 'Good Faith in the Performance of a Contract in English Law' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 198–9; Rosalie Jukier, 'Good Faith in Contract: A Judicial Dialogue between Common Law Canada and

In addressing good faith duties in Commonwealth laws, American contract law serves as an essential point of reference.[29] The reason lies in the fact that the concept of good faith is recognised in the United States.[30] While the good faith-related line of argumentation arose in American jurisdictions in early cases at the turn of the twentieth century,[31] the doctrine of good faith performance developed and gained wide acceptance largely under two model law instruments[32] – the Uniform Commercial Code,[33] which has been enacted into statutory law throughout the states, and the non-binding *Restatement (Second) of Contracts*.[34] Both the UCC[35] and the *Restatement*[36] expressly impose a general mandatory duty of good faith in contract performance and enforcement. In consequence, it stands as an axiom that the implied covenant of good faith and fair dealing is a part of every contract.[37] Not without significance is the impact the civil law approach has had upon the perception of good faith duty in the UCC.[38] Thus, the adoption of

Québec' (2019) 1(1) Journal of Commonwealth Law 83; Raczynska (n 8) 87; Lisa Spagnolo, 'The International Dimensions of Australian Contract Law' in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21st Century* (The Federation Press 2021).

[29] Halberda (n 8) 236, 250–1.

[30] ibid. See also Shannon Kathleen O'Byrne and Ronnie Cohen, 'The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v Hrynew*' (2015) 53(1) Alberta Law Review 1, 21–33; Pargendler (n 3) 151; Nicholas Reynolds, 'Two Views of the Cathedral: Civilian Approaches, Reasonable Expectations, and the Puzzle of Good Faith's Past and Future' (2019) 44(2) Queen's Law Journal 388, 392; Markovits (n 27) 48; Giliker (n 9) 176; DiMatteo (n 1) 28, 42; James Gordley, *Foundations of American Contract Law* (Oxford University Press 2023) 179.

[31] This is exemplified by the case *Kirke La Shelle Co. v Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933). See Steven J Burton, 'History and Theory of Good Faith Performance in the United States' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 210–4; Howard Hunter, 'The Implied Obligation of Good Faith' in Michael Furmston (ed) *The Future of the Law of Contract* (Informa Law 2020) 6–7; Markovits (n 27) 47; Halberda (n 8) 245.

[32] See Burton (n 31) 211; McKendrick (n 28) 198; Ewan McKendrick, 'Reply to Steven J Burton, "History and Theory of Good Faith Performance in the United States' Law" in Larry A DiMatteo, Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 223; Hunter (n 31) 7–8; Markovits (n 27) 47; Giliker (n 9) 176; Cartwright (n 9) 28; Halberda (n 8) 236, 250–1.

[33] American Law Institute, National Conference of Commissioners on Uniform State Laws, Uniform Commercial Code: Official Draft. Text and Comments Edition (1952).

[34] American Law Institute, *Restatement (Second) of Contracts* (1981).

[35] UCC § 1-304 (formerly § 1-203).

[36] American Law Institute, *Restatement (Second) of Contracts* (1981) § 205.

[37] Charles L Knapp and others, *Problems in Contract Law: Cases and Materials* (Aspen Publishing 2023) 497; Mark J Loewenstein, 'Reflections on the Implied Covenant of Good Faith and Fair Dealing under Delaware Law: The Case of Sandbagging' (2024) 48 Delaware Journal of Corporate Law 1, 2.

[38] On to what extent the UCC drew on the German law provisions embracing good faith, see Paul MacMahon, 'Good Faith and Fair Dealing as an Underenforced Legal Norm' (2015) 99(6)

a general obligation of good faith was intended to form a part of a broader programme aimed at reforming the general law of contract, so as to align commercial law with dynamics and realities of transactional practice.[39] In its current version, shaped by the 2001 revision, the UCC generally defines good faith as honesty in fact and the observance of reasonable commercial standards of fair dealing.[40] As such, the requirements for judging a party's good faith are twofold and embrace subjective standards of acting honestly and, complementarily, objective standards of reasonableness.[41] This expanded definition under the UCC follows what marked the *Restatement*'s authoritative approach.[42] Without limiting the scope of application of the formula, it conceptualises good faith performance or enforcement of a contract in terms of faithfulness to an agreed common purpose and consistency with the justified expectations of the other party, but at the same time – of community standards of decency, fairness or reasonableness.[43] A non-binding authority, the *Restatement* represents the consensus views of the common law systems of the different states,[44] and has considerably impacted American judge-made law.[45] There is not, however, a unanimous understanding of good faith throughout the states.[46] Along with the UCC, the *Restatement* provided a persuasive perspective on good faith which has been contemplated in the comparative surveys in other common law jurisdictions.

The influence of United States law is evident in the development of good faith in Australia.[47] Central to the emergence of good faith doctrine has been a series of cases initiated in the early 1990s in New South Wales[48] where the position under

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Minnesota Law Review 2051, 2060; Pargendler (n 3) 151; Reynolds (n 30) 392, 395–6; Catherine Pedamon and Radosveta Vassileva, 'The "Duty to Cooperate" in English and French Contract Law: One Channel, Two Distinct Views' (2019) 14(1) Journal of Comparative Law 1.

[39] MacMahon (n 38) 2060; Burton (n 31) 213.

[40] UCC § 1-201(b)(20).

[41] Jay M Feinman, 'Good Faith and Reasonable Expectations' (2014) 67(3) Arkansas Law Review 525, 551–2; Knapp and others (n 37) 497; Halberda (n 8) 251.

[42] Halberda (n 8) 251.

[43] American Law Institute, *Restatement (Second) of Contracts* (1981) § 205 cmt (a).

[44] Hunter (n 31) 8.

[45] Halberda (n 8) 251.

[46] See Hunter (n 31) 9.

[47] Elisabeth Peden, 'Contractual Good Faith: Can Australia Benefit From the American Experience?' (2003) 15(2) Bond Law Review 186; John W Carter, 'Good Faith in Contract: Why Australian Law is Incoherent' (Legal Studies Research Paper No 14/38, Sydney Law School, March 2014) 6; Halberda (n 8) 236, 250–3.

[48] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 ('*Renard*'); *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91 ('*Hughes Bros*'); *Burger King Corp v Hungary Jack's Pty Ltd* [2001] NSWCA 187; *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 16;

the UCC and the *Restatement* has been explicitly referred to.[49] Importantly, what distinguishes New South Wales from other Australian states is that it reformed its judicial system, by providing for the concurrent administration of law and equity, as recently as in the 1970s.[50] It is argued that while there continue to be doubts and controversies, and the legal settings are ever-changing across states, the concept of good faith as the underlying principle of contract law appears to have been acknowledged in New South Wales.[51] However, not only is the authority of the much-referenced cases, *Renard*[52] and *Hughes Bros*,[53] called into question, but also the limited circumstances under which New South Wales courts have recognised an obligation of good faith – specifically, where contractual discretion was involved, cast doubts on whether the position is already settled.[54] Although questionable, the first and leading of the series of formative cases, *Renard*[55] is considered to have originated the idea of recognising good faith in contracts through construction techniques, yet without concretising it in terms of the distinction between implication in fact and in law.[56] This latter question remains problematic and open to debate, as it has not been clarified by the High Court of Australia in several cases where the good faith-related arguments were invoked.[57] In *Royal Botanic*

Adventure World Travel Pty Limited v Newsom [2014] NSWCA 174; *Bartlett v ANZ Banking Group Limited* [2016] NSWCA 30. See Hunter (n 31) 16; Halberda (n 8) 242, 247.

[49] Hunter (n 31) 16; Halberda (n 8) 251–2.

[50] Halberda (n 8) 242. See also Turner (n 16) 1.

[51] Halberda (n 8) 243, 253–4. See also Robert McDougall, 'The Implied Duty of Good Faith in Australian Contract Law' [2006] 2 New South Wales Judicial Scholarship 2; Tyrone M Carlin, 'The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia' (2002) 25(1) UNSW Law Journal 99, 123; Hunter (n 31) 16–18.

[52] *Renard* (n 48).

[53] *Hughes Bros* (n 48).

[54] Carlin (n 51) 103–12. See also Howard Munro, 'The "Good Faith" Controversy in Australian Commercial Law: A Survey of the Spectrum of Academic Legal Opinion' (2009) 28(1) The University of Queensland Law Journal 167, 167, 173.

[55] *Renard* (n 48).

[56] Marcel Gordon, 'Discreet Digression: The Recent Evolution of the Implied Duty of Good Faith' (2007) 19(2) Bond Law Review 26; Jessica Viven-Wilksch, 'Good Faith in Contracts: Australia at the Crossroads' (2019) 1 Journal of Commonwealth Law 273, 280, 314; Raczynska (8) 73; Halberda (n 8) 242; Alex Wan and Peng Guo, *Good Faith Obligation: A Comparative Perspective* (Springer Singapore 2024) 5, 97–117. See also Ryan Catterwell, *A Unified Approach to Contract Interpretation* (Hart Publishing 2020) 211.

[57] *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289 ('*Royal Botanic Gardens*'); *Commonwealth Bank of Australia v Barker* [2014] HCA 32. See Carlin (n 51) 110–11, 120–1; Warren Swain, '"The Steaming Lungs of a Pigeon": Predicting the Direction of Australian Contract Law in the Next 25 Years' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) 96; Viven-Wilksch (n 56) 284–5, 314; Raczynska (8) 73; Viven-Wilksch (n 4) 109; David Christie, Séverine Saintier

Gardens,[58] while admitting a growing tendency to imply into private contractual dealings a covenant of good faith and fair dealing,[59] the Court's position was to emphasise the absence of a definite statement on 'whether both in performing obligations and exercising rights under a contract, all parties owe to one another a duty of good faith; and, the extent to which, if such were to be the law, a duty of good faith might deny a party an opportunistic or commercial exercise of an otherwise lawful commercial right'.[60] A significant reason why a reception of a general principle of good faith is viewed with scepticism is that arguably the doctrines thus far developed by courts do incorporate various aspects of such obligations.[61] These uncertainties notwithstanding, the Australian case law is claimed to reflect and adhere to a distinct 'implied duty model' of good faith, yet the courts proceed circumspectly in imposing by implication such duties on the parties.[62] There are instances of adjudication involving good faith which are purported to evince its acknowledgement in Australian contract law.[63] One such case is *Paciocco v Australia and New Zealand Banking Group Ltd* ('*Paciocco*'),[64] where – while admitting the ongoing scepticism of the judiciary – the Federal Court of Australia resorted to good faith declaring it to be 'a conception that has been recognised as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content'[65] as well as an exemplification of 'the presence of values in the common law'.[66] Additionally, the usual content of the obligation of good faith was summarised as 'an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably

and Jessica Viven-Wilksch, 'Industry-Led Standards, Relational Contracts and Good Faith: Are the UK and Australia Setting the Pace in (Construction) Contract Law?' (2022) 43(2) Liverpool Law Review 287, 289; Anthony Davidson Gray, 'Relational Contract Theory, the Relevance of Actual Performance in Contractual Interpretation and Its Application to Employment Contracts in the United Kingdom and Australia' (2023) 52(2–3) Common Law World Review 61, 77; Halberda (n 8) 253–4.

[58] *Royal Botanic Gardens* (n 57).

[59] ibid [87].

[60] ibid [156]. See also, more recently, *Brad Teal Pty Ltd v Evr Group Pty Ltd* [2024] VCC 485 [136]; *Votua Pty Ltd v Lineal Developments Pty Ltd* [2024] VCC 1699 [523], stating that 'the High Court is yet to recognise a universal implied duty of good faith in contract performance'.

[61] Susan Kiefel, 'Good Faith in Contractual Performance': A background paper for the Judicial Colloquium, Hong Kong, September 2015, <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/kiefelj-2015-09.pdf> accessed 2 July 2024.

[62] Raczynska (8) 73.

[63] See Chen-Wishart and Dixon (n 27) 194.

[64] [2015] FCAFC 50, (2015) 236 FCR 199.

[65] ibid [287].

[66] ibid.

and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained'.[67] Significantly, the conceptualisation of good faith in *Paciocco* was relied upon by the English High Court in a recent influential decision on the implication of good faith terms.[68] Also worthy of note is the fact that good faith is presumed to constantly underlie the discussions on the duties to co-operate and exercise discretionary rights in a reasonable manner, which have been enforced by Australian courts.[69] These exist as default rules of law implemented, in most cases, as implied terms in law or rules of construction.[70] What informs such duties and standards of co-operation in contract law is the need to protect the performance interests of the parties.[71] Apart from being implemented through the judge-made law – which apparently reflects a rather conservative approach to contract,[72] the notion of good faith has also been markedly introduced in Australian law over the last decade through targeted industry-specific statutory regulation.[73] A duty on parties to act in good faith has been expressly included in a number of codes of conduct, both mandatory and voluntary, legislated by the Federal Australian Parliament to regulate the operation and trading practices of particular industries.[74] Under the first in a set of mandatory industry codes prescribed under the Competition and Consumer Act 2010 (Cth)[75] – the Franchising Code of Conduct enacted in 2014,[76] the obligation of good faith, conceived within the meaning of the unwritten law,[77] comprises the requirements to act honestly and not arbitrarily, and to co-operate to achieve the purposes of the agreement.[78] Subsequent industry codes have also been designed to promote and support good

[67] ibid [288]. See also Christie, Saintier and Viven-Wilksch (n 57) 302; Halberda (n 8) 243–4.

[68] *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm) ('*Al Nehayan*') [175]. See Paul S Davies, 'The Basis of Contractual Duties of Good Faith' (2019) 1 Journal of Commonwealth Law 1, 11; Christie, Saintier and Viven-Wilksch (n 57) 302–3; Halberda (n 8) 244; Leggatt (n 27) 461, 471.

[69] Viven-Wilksch (n 56) 285–6. See also Ryan Catterwell, 'Co-Operation and Prevention in Contract Law' (2023) 47(1) Melbourne University Law Review 112, 132.

[70] Catterwell (n 69) 115, 152.

[71] ibid 115.

[72] Viven-Wilksch (n 4) 119–120.

[73] ibid 120–3. See also Christie, Saintier and Viven-Wilksch (n 57) 291–2.

[74] Viven-Wilksch (n 4) 97, 120–1. See also Andrew Terry, 'The Unusual Place of Industry Codes of Conduct in the Regulatory Framework' (2022) 45(2) UNSW Law Journal 649, 664.

[75] Competition and Consumer Act 2010 (Cth) (Australia). See Viven-Wilksch (n 4) 121.

[76] Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Cth) (Australia).

[77] ibid cl 6(1).

[78] ibid cl 6(3). See also Robert W Emerson, 'The Faithless Franchisor: Rethinking Good Faith in Franchising' (2022) 24(2) University of Pennsylvania Journal of Business Law 411, 470–1; Viven-Wilksch (n 4) 121.

faith as an enforceable obligation, foregrounding business integrity, ethics and the relationships between the parties.[79] Arguably, this Australian legislative approach is indicative of the recognition of implicit dimensions of contracting, and notably of its relational qualities.[80] What is referred to, and substantially drawn upon here[81] is the tenets of the American relational theory of contracts[82] which has recently had – as will be exposed – a pivotal, although not uniform,[83] influence over contract law in a number of common law jurisdictions and beyond.

Likewise, comparative arguments have had a prominent influence on how the Canadian common law approach to good faith recently evolved. Notably, American law, along with the civil law of Quebec, is among the major points of reference brought up in the course of the development of good faith in Canada.[84] The advancement in case law was preceded by the publication of two subsequent reports by the Ontario Law Reform Commission,[85] both invoking the American authorities and recommending the recognition of a doctrine of good faith in the performance and enforcement of contracts in line with the position under the *Restatement (Second) of Contract*.[86] Most consequentially, in 2014 the Supreme Court of Canada in *Bhasin v Hrynew* ('*Bhasin*')[87] adopted a principled approach to good faith which is argued to have innovated the common law account of contracting.[88] In departing

[79] Viven-Wilksch (n 4) 121.

[80] ibid 97, 120–1, 123. See also Christie, Saintier and Viven-Wilksch (n 57) 292.

[81] See Viven-Wilksch (n 4) 99.

[82] For the origins of the relational theory of contract, see especially Stewart Macaulay, 'Non-contractual Relations in Business: A Preliminary Study' (1963) 28(1) American Sociological Review 55; Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 Southern California Law Review 691; Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980). See also David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell 2001); David Campbell, Linda Mulcahy and Sally Wheeler (eds), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Palgrave Macmillan 2013); David Campbell (ed), *Stewart Macaulay: Selected Works* (Springer 2020); Campbell (n 27) 47–50; Jonathan Morgan, 'Professor Ian Roderick Macneil (1929–2010)' in James Goudkamp and Donal Nolan (eds), *Scholars of Contract Law* (Hart Publishing 2022); DiMatteo (n 1) 308–12; Jay M Feinman, 'Recapturing Relational Contract Theory' (2024) Rutgers Law School Research Paper (forthcoming).

[83] See, eg, Campbell (n 27) 47–8.

[84] O'Byrne and Cohen (n 30) 21; Halberda (n 8) 251–2.

[85] Ontario Law Reform Commission, *Report on Sale of Goods* (1979) vol 1, 163–171; Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) 165–175.

[86] See Reynolds (n 30) 392–3; Halberda (n 8) 251.

[87] [2014] SCC 71, [2014] 3 SCR 494.

[88] See Bertolini (n 20) 375–6; Reynolds (n 30) 389; Raczynska (n 8) 73–4; Stephen Waddams, 'Good Faith in the Supreme Court of Canada' in Michael Furmston (ed), *The Future of the Law of Contract* (Informa Law 2020); Catherine Mitchell, *Vanishing Contract Law: Common Law in the Age of Contracts* (Cambridge University Press 2022) 189; John D McCamus, 'The Supreme Court of Canada and the Development of a Canadian Common Law of Contract' (2022) 45(2) The

from the historical Anglo-Canadian common law's resistance to a generalised and independent doctrine of good faith performance of contracts, much of the Court's criticism regarded its not conforming to the civil law of Quebec and the majority of jurisdictions in the United States.[89] What is borne out of this course of comparative analysis in *Bhasin* is the underlying influence of the civilian approach on good faith in Anglo-Canadian law.[90] First, the reliance on the Civil Code of Quebec,[91] which has historically been based on the French Civil Code,[92] led to a civil-law-like conceptualisation of good faith as a relatively extensive doctrine of a general application.[93] Further, insofar as the argumentation in *Bhasin* drew on the American authorities, including the UCC, it is maintained that – given the German law-inspired position of the latter – the development of good faith in Canadian common law was thus indirectly informed by the civilian tradition.[94] References were also made to developments in the United Kingdom and Australia where good faith in contract performance has received increasing prominence, though without being embraced as a stand-alone doctrine.[95] Relatedly, and in parallel to the comparative surveys, of import for the reasoning in *Bhasin* were the relationalist arguments.[96] Drawing on empirical research on relational norms and expectations of commercial parties, the Canadian Supreme Court substantiated the necessity of a basic level of honesty and good faith in contractual dealings.[97] On that account, the Supreme Court in *Bhasin* was of the view that articulating a general organising principle of good faith and recognising a duty to act honestly in the performance of contractual obligations appear to be instrumental in bringing certainty and coherence to

Manitoba Law Journal 7, 37–42; Marcus Moore, 'Developments in Contract Law: The 2020-2021 Term – Appeals to Fairness' (2022) 106 Supreme Court Law Review, 2nd Series 3, 23–5; Robert M Yalden, 'New Perspectives on Good Faith in Contractual Negotiation' (2023) 67(2) Canadian Business Law Journal 165, 181–2; Brandon Kain, *Good Faith in Canadian Contract Law*, Vol 1–2 (LexisNexis Canada 2024).

[89] *Bhasin* (n 87) [32, 41, 82]. See also Reynolds (n 30) 392, 416; Halberda (n 8) 250. For criticism, see Waddams (n 88) 37; Giliker (n 9) 184–5, 188–9.

[90] Rosalie Jukier, 'From La Beauce to Le Bayou: A Transsystemic Voyage' (2019) 12(1) Journal of Civil Law Studies 1, 30. See also Reynolds (n 30) 404. For criticism, see Waddams (n 88) 38, 47.

[91] *Civil Code of Québec*, CQLR c CCQ-1991.

[92] *Code Civil* [Civil Code] (France). See Jukier (n 90) 5–6.

[93] Bertolini (n 20) 362, 366–7, 368; Daniele Bertolini, 'Toward a Framework to Define the Outer Boundaries of Good Faith in Contractual Performance' (2021) 58(3) Alberta Law Review 573, 577; Jukier (n 28) 90–1, 98; Reynolds (n 30) 391, 394.

[94] Reynolds (n 30) 392, 395–6.

[95] *Bhasin* (n 87) [57, 58]. See Halberda (n 8) 250.

[96] *Bhasin* (n 87) [60–1]. See also Zhong Xing Tan, 'Disrupting Doctrine? Revisiting the Doctrinal Impact of Relational Contract Theory' (2019) 39(1) Legal Studies 98, 111.

[97] *Bhasin* (n 87) [60–1]. See also Tan (n 96) 111.

contract law in a way that is consistent with reasonable commercial expectations.[98] An organising principle, conceived in terms of a requirement of justice, has been perceived as an independent standard that underpins and is manifested in more specific legal doctrines governing contractual performance.[99] It is argued that by defining good faith as an organising principle thus understood, the Supreme Court circumvented the concerns connected with the implication of contract terms.[100] Instead of being thought of as an implied term, the duty of honest performance, flowing directly from the common law organising principle of good faith, was conceptualised as a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance.[101] Designed to operate irrespective of the intentions of the parties, this non-excludable duty is analogised with equitable doctrines which impose limits on the freedom of contract.[102] Such an approach has been summarised as an instantiation of a macro-level intervention whereby a new and distinct foundational principle in contract is introduced, capable of originating a novel common law duty of honest contractual performance.[103] On these grounds, the judgement in *Bhasin* is considered to exemplify a type of intervention to accommodate relational norms through reconstruction in common law, referred to as 'reconstructive relationalism'.[104] As indicated in the Supreme Court's pronouncement, the organising principle of good faith requires that in performing the contract a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner.[105] Therefore, the application of this standard entails a highly context-specific perspective on honesty and reasonableness in performance, but at the same time warrants consistency with fundamental commitments of the common law of contract, with its focus largely on the freedom of contracting parties to pursue their individual self-interest.[106] It was thus ascertained that the proposed approach to good faith does not interfere with the pursuit of self-interest, since a contracting party can prioritise their own

[98] *Bhasin* (n 87) [62].

[99] ibid [63–4]. See also Mitchell (n 88) 189; Kain (n 88) Vol 1 ch 2, Vol 2 ch 6.

[100] Gray (n 57) 77. See also Raczynska (8) 73.

[101] *Bhasin* (n 87) [74–5]. This approach to good faith duty has been uphold by the Supreme Court of Canada in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* [2021] SCC 7 ('*Wastech*') [91, 94]. See also Mitchell (n 88) 191; Daniele Bertolini, 'Unpacking Entire Agreement Clauses: On the (Elusive) Search for Contractually Induced Formalism in Contractual Adjudication' (2021) 66(3) McGill Law Journal 465, 489.

[102] *Bhasin* (n 87) [74–5]. See also Waddams (n 88) 29, 36, 39; Bertolini (n 101) 496; Giliker (n 9) 186–7.

[103] Tan (n 96) 111. See also Viven-Wilksch (n 4) 101.

[104] Tan (n 96) 111. See also Christie, Saintier and Viven-Wilksch (n 57) 305; Viven-Wilksch (n 4) 101.

[105] *Bhasin* (n 87) [65]. See also Mitchell (n 88) 190.

[106] *Bhasin* (n 87) [69–70]. See also Giliker (n 9) 185.

interests, as long as they do not infringe the basic duty of honesty.[107] The centrality of the general organising principle of good faith established in *Bhasin*, and likewise of the good faith doctrines deriving therefrom, was recently confirmed and expanded – not without criticism[108] – by the Supreme Court of Canada in *CM Callow Inc v Zollinger* ('*Callow*')[109] and in *Wastech*.[110] Both these decisions, marked by tensions between the majority and the minority reasoning, are viewed as seeking to explicate the persisting legal uncertainties of the applicability of the *Bhasin* approach.[111] In clarifying the good faith doctrine of the duty of honest performance, the Supreme Court in *Callow* endorsed the expansion of the application of the duty of honesty 'to the performance of all contracts and, by extension, to all contractual obligations and rights'.[112] While it has been asserted by the Court that the very nature of such a duty, as a contract law doctrine, 'gives rise to the requirement of a nexus with the contractual relationship',[113] which thereby defines its scope and averts commercial uncertainty, this conceptualisation is criticised as incomplete.[114] The *Wastech* judgment sought to define the content and the source of the general duty to exercise contractual discretionary powers in good faith – by spelling out that such a duty 'will be breached where the exercise of discretion is unreasonable, in the sense that it is unconnected to the purposes for which the discretion was granted',[115] and that it 'is not an implied term, but a general doctrine of contract law that operates irrespective of the intentions of the parties' and, 'like the duty of honest performance', 'should be understood to be obligatory in all contracts'.[116] Yet, thus construed, the test adopted in *Wastech* has raised doubts regarding the extent of the court's power to police the exercise of contractual discretion.[117]

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[107] See Mitchell (n 88) 190.

[108] See Vanessa Di Feo, '*CM Callow v Zollinger, Reconceptualized through the Tort of Negligent Misrepresentation' (*2022) 27 Appeal 103; Krish Maharaj, 'Good Faith Not Good for Consistency: Irreconcilable Results in *Wastech* and *Callow*' (2022) 55(2) UBC Law Review 511; Anna SP Wong, 'Duty of Honest Performance: A Tort Dressed in Contract Clothing' (2022) 100(1) Canadian Bar Review 95.

[109] [2020] SCC 45. See also Bertolini (n 101) 469, 496; Bertolini (n 93) 575–6, 586–90, 612–14; Giliker (n 9) 187–8; Mitchell (n 88) 189; Moore (n 88) 25–34; Halberda (n 8) 245; Yalden (n 88) 182.

[110] *Wastech* (n 101). See also Bertolini (n 101) 469, 496; Bertolini (n 93) 575–6, 580–86, 608–12; Vanessa Di Feo, 'You've Got to Have (Good) Faith: Good Faith's Trajectory in Anglo-Canadian Contract Law Post-*Wastech* and the Potential for a Duty to Renegotiate' (2022) 45(1) Dalhousie Law Journal 35; Giliker (n 9) 189–90; McCamus (n 88) 42–3; Mitchell (n 88) 190–1; Moore (n 88) 34–48; Halberda (n 8) 250, 253; Yalden (n 88) 183.

[111] Bertolini (n 93) 576. See also Giliker (n 9) 187–90.

[112] *Callow* (n 109) [53]. See Bertolini (n 93) 575.

[113] *Callow* (n 109) [66].

[114] Bertolini (n 93) 575. Di Feo (n 110) 19; Giliker (n 9) 188–9.

[115] *Wastech* (n 101) [88].

[116] ibid [94].

[117] Bertolini (n 93) 576. See also Di Feo (n 110) 19, 25; Giliker (n 9) 189–90.

While England and Wales are among the common law jurisdictions recently marked by an increased interest in and a debate over good faith in contracting, the direction of judicial developments in English law contrasts with how this question has been addressed in other Commonwealth laws, and in American law.[118] What is apparent is an attempt, yet originating in and confined to lower courts, to recognise good faith in contractual performance as an implied term in relational contracts.[119] Considered a landmark decision[120] of prime importance to this line of case law is *Yam Seng Pte Limited v International Trade Corporation Limited* (‘*Yam Seng*’).[121] Contrary to the objections inherent in English common law towards a doctrine of good faith[122] and the persistent leaning to piecemeal solutions in response to unfairness in contract,[123] *Yam Seng* argued for a refined approach based on a broad comparative perspective.[124] Not only were other common law jurisdictions – such as the United States,[125] Canada,[126] Australia,[127] and New Zealand[128] referenced, but the focus also was on mixed jurisdictions – exemplified by Scottish law,[129] and on civil law systems, with a direct resort to the Roman law experience.[130] Furthermore, the latter were pointed to as the source of the penetration of good faith requirements into English law through the European Union legislation.[131] These comparative arguments were complemented by a recourse to the relational contract theory, and mostly to its foundational

[118] See Mitchell (n 88) 189–192; Cartwright (n 9) 34; Leggatt (n 27) 455.

[119] Mitchell (n 88) 177–8, 190–2; Halberda (n 8) 238–9; Leggatt (n 27) 455–6.

[120] See Tan (n 96) 110; Cartwright (n 9) 34; David Campbell, ‘Plus ça change, plus c’est la même chose: *Mackie Motors* v *RCI* and *Baird Textiles* v *Marks and Spencer*’ (2024) 87(4) Modern Law Review 1010, 1010– 11; Gray (n 20) 104; Halberda (n 8) 238.

[121] [2013] EWHC 111 (QB).

[122] See generally Giliker (n 9) 178; Cartwright (n 9) 34; Gray (n 20) 93–7; Halberda (n 8) 238–9; Leggatt (n 27) 455. See also Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies’ (1998) 61(1) Modern Law Review 11.

[123] *Yam Seng* (n 121) [121–4], citing Bingham LJ (as he then was) in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 [439]; *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 [27]. See also Chen-Wishart and Dixon (n 27) 187, 195; Raczynska (8) 66; Cartwright (n 9) 32; Gray (n 20) 113; Halberda (n 8) 237–8, 254.

[124] Halberda (n 8) 250. See also Leggatt (n 27) 464–7.

[125] *Yam Seng* (n 121) [125].

[126] ibid [126].

[127] ibid [127–8].

[128] ibid [129].

[129] ibid [130].

[130] ibid [124–5]. See also Jukier (n 28) 86; Shy Jackson, ‘Good Faith under English Law: Evolution or Revolution?’ (2020) 55 Derecho & Sociedad 33, 34; Halberda (n 8) 250, 252–3.

[131] *Yam Seng* (n 121) [124]. As well, not without bearing were the pressures, at the time of the judgement, towards a more unified European law of contract in which the good faith principle plays a significant role. See ibid; Giliker (n 9) 178–9; Cartwright (n 12) 11, 68; Cartwright (n 9) 27; Halberda (n 8) 252; Gray (n 20) 131; Perry (n 26) 42.

part emphasising the weight of social context to understanding contractual exchanges.[132] The reasoning in *Yam Seng* was centred on identifying implicit shared values and norms of behaviour which compose, along with matters of fact known to the parties, the relevant background against which contracts are made.[133] These were exemplified by an expectation of honesty, a quality essential to commerce, which is highly trust-dependent.[134] Observance of such standards of commercial dealing was defined as one of two principal aspects of good faith, in addition to fidelity to the parties' bargain.[135] Still, the requirements of good faith were characterised in terms of context sensitivity.[136] Consistent with this view is the *Yam Seng*'s finding that an implied duty to perform in good faith would arise in relational contracts – ones involving a longer term relationship between the parties which they make a substantial commitment, and requiring a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, while at the same time entailing expectations of loyalty implicit in the parties' understanding and necessary to give business efficacy to the arrangements.[137] The judicial engagement with the implied term of good faith in later cases, including *Al Nehayan*,[138] *Bates v Post Office Ltd No 3*[139] and *Essex County Council v UBB Waste (Essex) Ltd*[140] tended to further articulate the concept of relational contracts.[141] However, to the extent that the approach advanced in *Yam Seng* is found to be irreconcilable with the existing doctrines of the classical-style English contract law, it proves to be controversial.[142] Problematically, the impact of the implied term is sought to be hampered by the judiciary's readiness to subsume it within the traditional law, whereby the operation of the good faith obligation is exposed to restraints.[143] Also, an approach argued for in academia is that the development of good faith be limited and consistent with English law model of contract, without imposing positive duties on parties but rather giving effect to their own intentions through implied terms.[144] This, in turn,

[132] *Yam Seng* (n 121) [142]; Leggatt (n 27) 460. See also Mitchell (n 88) 181–2; Perry (n 26) 7, 42–3.

[133] *Yam Seng* (n 121) [134].

[134] ibid [135]. See also Mitchell (n 88) 182.

[135] *Yam Seng* (n 121) [138–40]. See also Raczynska (8) 78–9.

[136] *Yam Seng* (n 121) [141].

[137] ibid [142]. See also Giliker (n 9) 182–3; Cartwright (n 9) 35, 37; Leggatt (n 27) 456–60.

[138] *Al Nehayan* (n 68).

[139] [2019] EWHC 606 (QB), [2019] All ER (D) 100.

[140] [2020] EWHC 1581 (TCC).

[141] See Raczynska (n 8) 82–3; Mitchell (n 88) 182–3, 185–6; Viven-Wilksch (n 4) 109, 110–7; Cartwright (n 9) 34; Leggatt (n 27) 460–4.

[142] Mitchell (n 88) 183–4, 185–6, 192–3, 201. See also Raczynska (n 8) 87; Halberda (n 8) 254.

[143] For the criticism of this approach see Mitchell (n 88) 186, 189.

[144] Chen-Wishart and Dixon (n 27) 231–2; Cartwright (n 9) 37. See also Halberda (n 8) 254–5.

appears to entail minimising the significance and practical value of the concept of the relational contract as a legally recognised distinct category.[145] A relatively recent case decided by the Court of Appeal, *Mackie Motors (Brechin) Ltd* v *RCI Financial Services Ltd*,[146] addressing the category of relational contracts, allegedly exemplifies a distancing in adjudication from the understanding of good faith, and the special status of relational contractual contexts, set out in *Yam Seng*.[147] However, while legal discussion continues on the recognition of good faith and reception of relational contracts in English law, what is anticipated is that it is presumably likely to develop, through an enhanced exchange of ideas among judiciaries, along with other common law jurisdictions, mostly Australian and Canadian laws.[148] Interestingly, it is suggested to prospectively appeal for evidence not only from the latter, but also from civil law jurisdictions, such as French contract law, in the practicalities of good faith contracting under English law.[149] This argument conceivably bears relevance, given the recent enlargement of the scope of the principle of good faith under the 2016 reform of the French Civil Code.[150] More generally, what has been identified as a factor in developing and recurring to good faith in the English judiciary is the increasing interaction between civil and common law lawyers, mostly within international arbitration.[151]

III. THE EVOLVING CIVIL–COMMON LAW DIMENSION OF POLICING COMMERCIAL CONTRACTS

What is apparent from the above overview of the most recent legal developments across Commonwealth jurisdictions is a measurable and direct impact of the respective civil law-derived conceptualisations on how common law has addressed and accommodated good faith obligations in contracts. While the approaches adopted towards acknowledgement of good faith do diverge, they have concurrently referenced, and been informed by, the civilian account.

[145] Mitchell (n 88) 186. See also Viven-Wilksch (n 4) 117–9; Campbell (n 120) 1011, 1016–18.

[146] [2023] EWCA Civ 476, [2023] All ER (D) 15 (May). This decision upheld the High Court's position in *Mackie Motors (Brechin) Ltd v RCI Financial Services Ltd* [2022] EWHC 1942 (Ch), [2022] All ER(D) 40 (Aug).

[147] See Campbell (n 120) 1010–18.

[148] Halberda (n 8) 255. See also Munro (n 54) 179; Swain (n 57) 96–7.

[149] Cartwright (n 9) 28, 37.

[150] *Code Civil* [Civil Code] (France) art 1104: 'Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy'. See Solène Rowan, *The New French Law of Contract* (Oxford University Press 2022) 33, 35–44, 51–2, 256–7.

[151] Jackson (n 130) 34, 49.

There is also, however, a broader identifiable context of the ongoing interactions between civil and common law involving the axiological rationales behind good faith duties in commercial contracting. This is arguably reflected through the parallelisms in the course and dynamics of developments in contracts between decodifying civil law systems and common law departing from its classical account of the law of contract.[152] Characteristically, the parallel processes resulting in a divergence from the two 19th-century paradigms previously in place in both legal traditions are significant for the direction of contract regulation. Whereas the decodification translates into the erosion of contract law frameworks centred on the concept of a civil code originated in the nineteenth century, the corresponding changes in common law record the disintegration of the Anglo-American general theory of contract.[153] Also, of weighty significance is the extent to which these twofold processes involve, and draw upon, the advancement in the relational theory of contract.[154]

Debated in academia since the 1970s,[155] decodification denotes a range of ongoing advancements in continental private law that undermine the authority of, and the logical-interpretive categories behind, a general reasoned systematisation of rules and principles which had been theorised in the seventeenth and eighteenth centuries, and endorsed in the ensuing major codifications of the nineteenth century.[156] It is characterised as an objectively occurring process within the sequence of stages of the development of private law.[157] While its main impact is on the structure and rank of private law norms within the codified systems, it at the same time affects jurisprudence and the practicalities of legal transactions.[158] Still, what symptomises the decodifying pressure is the decrease of the internal coherence and clarity of the code-centric laws, mostly following the rise in prominence of the extra-code special legislation, which is largely the effect of the parallel and related

[152] Dajczak (n 11) 88–93, 101–2; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145–8. See also Longchamps de Bérier, 'Common law' (n 11) 27, 30–32, 48.

[153] Dajczak (n 11) 88–93, 101–2; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145–8. See also Rémy Cabrillac, 'The Codifications at the Beginning of the Twenty-First Century' in Michele Graziadei and Lihong Zhang (eds), *The Making of the Civil Codes: A Twenty-First Century Perspective* (Springer 2023) 18; Pia Letto-Vanamo, 'The European and the Transnational in Historical Perspective' in Anna Beckers and others (eds), *The Foundations of European Transnational Private Law* (Hart Publishing 2024) 169.

[154] Dajczak (n 11) 90, 93. See also Mitchell (n 88) 33.

[155] Natalino Irti, *L'età della decodificazione* (Giuffrè 1979).

[156] Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 138, 145.

[157] See ibid 138–9.

[158] ibid 137, 144–5, 147; Jan Rudnicki, 'Formal and Material Decodification of Civil Law' in Chen Su, Franciszek Longchamps de Bérier and Piotr Grzebyk (eds), *Theory and Practice of Codification: The Chinese and Polish Perspectives* (Social Sciences Academic Press 2019).

processes of Europeanisation and globalisation in private law.[159] This has a direct effect on contract law, and is conducive to unfolding the emerging perception of a contract, mostly by foregrounding a jurisprudential dimension of its nature.[160] A growing feature accentuated in commercial contexts is that contracts appear to be the object of relational thinking.[161] Such an understanding implies a revision and refinement of how to comprehend the *pacta sunt servanda* principle, whereby rather on adherence to what was promised, the focus will be on the creditor's legitimate expectations at the time of the contract.[162] Incorporating the perspective of legitimate expectations of the creditor – traceable back to the ancient discourse on contracts – currently tends to be enhanced in law-making.[163] What is anticipated, then, is to broadly appreciate a flexible, jurisprudential approach to determining the scope of contractual duties, extended beyond the confinement to the parties' promises and statutory provisions, in the judicial effort to pursue the social and economic sense of a contract.[164] Thereby, the contract law's attention is sought to be directed to the non-explicit aspect of contracting. Yet, the resort to these criteria falls outside of what has been pertinent to the nineteenth- and twentieth-century civil law codification in delimiting the contractual freedom, on the basis of the parties' arrangements being contrary to law or good morals.[165] This arguably demonstrates the gradual decline of the then originated paradigm of codification designed to warrant legal certainty.[166]

In functional terms, the crisis of the paradigm of codification in the civilian legal systems is deemed to correspond to the demise and anachronism of the nineteenth-century Anglo-Saxon dogmatic account of contract law, referred to as classical contract law and associated with legal formalism.[167] While reflecting the legal setting of the 1970s, nearly coincident with the decodification claim were

[159] Tomasz Giaro, 'Dekodyfikacja.: Uwagi historyczno-teoretyczne' in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego: Szkice do portretu* (Wydawnictwo Sejmowe 2017) 29–30; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 138–9, 144; Rudnicki (n 158) 127–8; Cabrillac (n 153) 18; Aleksander Grebieniow and Jan Rudnicki, 'O postępach dekodyfikacji prawa cywilnego w Polsce w 2023 r. – trzy przykłady legislacyjne' [2024] 2 Forum Prawnicze 3; Letto-Vanamo (n 153) 169.

[160] Dajczak (n 11) 101; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145.

[161] Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145.

[162] See Dajczak (n 11) 89–90, 101.

[163] ibid 93, 100. This is illustrated by *Code Civil* [Civil Code] (France) art 1166. See also Rowan (n 150) 108.

[164] Dajczak (n 11) 100–1. See also Wojciech Dajczak, 'Europejska tradycja prawna – od klasyfikacji przez kodyfikację do ograniczeń i niepewności w typologii umów' in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego w europejskiej tradycji prawnej* (Wydawnictwo Uniwersytetu Jagiellońskiego 2019) 95.

[165] Dajczak (n 11) 101.

[166] ibid.

[167] ibid 89, 101; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145.

the arguments contending the impracticality of the American general theory of contract.[168] The theory – likewise intended to inform a universal, coherent and rational system of principles, rules and concepts applicable through formal and deductive modes of legal reasoning – had envisioned what is apprehended as 'a surrogate for codification'.[169] Also, its crucial premises were commitment to party autonomy and freedom of contract, along with the emphasis on the parties' individual self-interest and economic rationality.[170] The major criticism of the then developed classical liberal account of contract law was the failure of its axioms about the centrality of the terms of the parties' agreement and the prominence of the doctrine of consideration.[171] These were questioned in view of the twentieth-century developments in the law of contract in common law jurisdictions embracing modern equitable doctrines, such as promissory estoppel, unconscionability and good faith.[172] The supplantation of the classical contract law rules by more realistic counter-norms developed into its 'neo-classical' form.[173] Yet, the key conceptual framework which has been evolved over the past decades in opposition to the classical autonomy-oriented contract law is the relational theory of contract.[174] It disputed the traditional model of contract conceptualised as an abstract, self-interested transaction, isolated from its actual social context and disregarding the parties' expectations not expressed in their agreement.[175] As an alternative, the relational theory argued for a broad normative account of contract, with the focus on transactional dynamics instead of on a static apprehension of an objectivised content of the parties' promises.[176] Instrumental to this is due regard to the socially-embedded context of implicit expectations of the parties, as well as the pursuit of the integrity of relations and minimisation of conflicts.[177] Importantly, the relationalist arguments tended to impugn the classical model's commitment to notional certainty and predictability of contract law as a means

[168] Grant Gilmore, *The Death of Contract* (Ohio University Press 1974).

[169] ibid 101–2; Dajczak (n 11) 88–9. See also Mitchell (n 88) 30–1.

[170] See Mitchell (n 88) 30–1; DiMatteo (n 1) 248–266.

[171] Dajczak (n 11) 87–9; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145. See also Mitchell (n 88) 32.

[172] See Carlin (n 51) 99; Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press 2015) 74; DiMatteo (n 1) 267, 308, 311.

[173] Mitchell (n 88) 39–40, 51; DiMatteo (n 1) 308.

[174] Dajczak (n 11) 90–3; Campbell (n 27) 48, 60; Giliker (n 9) 181; Morgan (n 82) 295; Mitchell (n 88) 6, 33, 38–46, 192; DiMatteo (n 1) 308–12, 353. See also Jonathan Morgan, 'Contract Law as Regulation: Relational and Formalist Approaches' in Andrew Johnston and Lorraine Talbot (eds), *Great Debates in Commercial and Corporate Law* (Red Globe Press 2020) 11–20.

[175] Dajczak (n 11) 90–1; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 146; Ainslie (n 24) 35; Mitchell (n 88) 38–9.

[176] Dajczak (n 11) 91–2; Mitchell (n 88) 38.

[177] Dajczak (n 11) 91–2, 100–1; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 146–7. See also Ainslie (n 24) 34–5; Giliker (n 9) 181–2; Mitchell (n 88) 33, 38; DiMatteo (n 1) 310.

for contract planning in commercial contexts.[178] Endorsing the perception of contracts as instruments of future planning entailed that under the classical law of contract the extent of contractual liability was circumscribed by agreement.[179] By contrast, the relational theory emphasised the need for a flexible and dynamic scheme of extending contractual liability so as to embrace the instances of violation of duties not arising from the parties' promises.[180] While there is scepticism over an overarching application of the relational approach as a general theory of contract, it plausibly provides values and norms which neo-classical contract law fails to capture.[181] Good faith is among the doctrines in which contract law's relational elements have been acknowledged by the American legal scholarship.[182] Still, it should be noted that the relational contract theory has fallen subject to critiques of the economic analysis of law approach, most of which follow from neo-formalism – a line of scholarship arguing for a strict system of formalist interpretation in business contracts, devoid of equitable adjustments.[183] This is substantiated by a claim that the formalism of the classical contract law is vindicated by empirical studies and relational theory.[184]

Problematically, the complexity of this intertwined context of the parallel strands in civil and common law development is supposed to increase. The growing position and impact of common law in the globalising legal settings arguably contributes to compounding the process of decodification of private law in continental jurisdictions.[185] Not only is there a general trend towards Anglo-Americanisation of the law[186] and of the modes of contracting, especially of the contract drafting techniques,[187] but also consequential shifts in contract doctrines and regulation are driven by the pursuit of advantage in the competitive market for laws and international commercial dispute resolution.[188] The distinctiveness of

[178] Mitchell (n 88) 32. See also Dajczak (n 11) 92; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145–6.

[179] Mitchell (n 88) 30, 32. See also Dajczak (n 11) 92.

[180] Dajczak (n 11) 91–2.

[181] DiMatteo (n 1) 311.

[182] ibid. See also Mitchell (n 88) 48–9.

[183] Mitchell (n 88) 48; Morgan (n 174) 11; DiMatteo (n 1) 303–4, 308–9.

[184] Mitchell (n 88) 48.

[185] Longchamps de Bérier, 'Common law' (n 11) 27, 36–42, 49.

[186] ibid 26.

[187] Piotr Machnikowski, Justyna Balcarczyk and Monika Drela, *Contract Law in Poland* (Kluwer Law International 2020) 42–3; Louise Merrett and Antonia Sommerfeld, 'Incentives for Choice of Law and Forum in Commercial Contracts: Predicting the Impact of Brexit' (2020) 28(3) European Review of Private Law 627, 640; Cartwright (n 26) 74. See also Kaczorowska (n 10) 127.

[188] Mitchell (n 88) 17, 147. See also Gilles Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws' (2014) 34(3) Northwestern Journal of International Law & Business 455; Morgan (n 174) 4; Jacek Jastrzębski, 'Breach of Contract: A Converging Concept and Its Future in Civil Law' (2023) 31(4) European Review of Private Law 671, 694.

common law in these contexts affects the way in which civilian legal systems tend to be structured. This is exemplified by the recent 2016 reform of the French Civil Code, with the underlying objective being to render French contract law more attractive internationally and competitive with common law regimes.[189] In an effort to accommodate the international business, and thereby prove superior to the commercially-oriented common law paradigm,[190] the French reform sought to simultaneously endorse the inherent core values of substantive fairness and balanced solutions.[191] An instantiation of the enhanced powers for the court intervention to rebalance the contract is the reinforcement of and prominence attached to the principle of good faith under the modernised French Civil Code.[192] However, whereas lacking a consistent approach to the competing values of freedom of contract, transactional certainty, and the promotion of fairness, the reform is argued to have resulted in an internal incoherency and major uncertainties.[193]

Concurrently, the insights into the nature and consequences of the process of decodification in civilian systems can presumably inform arguments in the controversy surrounding the scope for contract codification in common law jurisdictions. One relatively recent and debatable example of such an initiative is the reform proposal contemplated by the Australian Commonwealth Attorney-General's Department in the 2012 Discussion Paper.[194] Interestingly, among the principal drivers of the contract law reform covered by the Paper, importance was

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[189] Rowan (n 150) 4–8, 258; Solène Rowan, 'The 2016 Reform of French Contract Law: Some Recent Developments' (2025) Cambridge Yearbook of European Legal Studies 1. See also Bénédicte Fauvarque-Cosson, 'National Reforms: New Instruments Towards Converging Rules within Europe? The Example of the French Contract Law Reform (2016)' in Francisco de Elizalde (ed), *Uniform Rules for European Contract Law? A Critical Assessment* (Hart Publishing 2018) 108, 113.

[190] In view of these objectives of the reform, much criticism rests with its failure to adequately converge with the distinctive attributes of common law – such as transactional certainty and predictability, the degree of party autonomy, minimal judicial intervention and the absence of a general institutional empowerment to undermine contractual terms based on moral open-ended standards. See Rowan (n 150) 258. While the international competition with common law jurisdictions was among the major rationales behind the reform, of significance were also the references to uniform contract law instruments, including the Principles of European Contract Law (PECL) and the UNIDROIT Principles of International Commercial Contracts (2010). See ibid 20, 51–2, 260–1.

[191] ibid 256–9.

[192] ibid 256–7.

[193] ibid 257–9. See also Solène Rowan, 'The Reform of French Contract Law: The Struggle for Coherency' in TT Arvind and Jenny Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Hart Publishing 2020) 234–6.

[194] Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* 2012. See Luke Nottage, 'The Government's Proposed Review of Australia's Contract Law: An Interim Positive Response' in Mary Keyes and Therese Wilson (eds), *Codifying Contract Law: International and Consumer Law Perspectives* (Routledge 2014); Luca Siliquini-Cinelli, 'Taking (Legal) Traditions Seriously, or Why Australian Contract Law Should Not Be Codified: An Unconventional Inquiry'

attached to elasticity as a means to support the operation of relational contracts by the use of flexible, gap-filling concepts like good faith.[195] Also, there has been a renewed interest in codifying English contract law, coinciding with the increase in formalism in contract law reasoning.[196]

Still, while not pretending to be conclusive,[197] parallelising the critical directions of the paradigm reorientation in contract laws in both legal traditions reveals a crucial quality of the emerging legal frameworks: the growing weight of the jurisprudential component of contract law.[198] This further requires a prospective attention to the manner of argumentation and interpretive exercise in contracts, with a view to proportionate the axiology of legal certainty and substantive fairness within the ambit of the law of contract.[199] Whereas the common law-specific case-by-case approach appears to be more apt to conform to these jurisprudential qualities, the civilian jurisdictions are all the more expected to assimilate the premises of the ongoing process of decodification in the attempt to facilitate the operation of contract law.[200] One of the prognostications related to the decodifying pressure is the increased role of general clauses in contract law, along with the quest for objectivised methods of ascertaining and substantiating values that are intrinsic to contracts.[201]

IV. THE IMPLICATIONS OF THE JURISPRUDENTIALLY ORIENTED PARADIGM FOR GOOD FAITH CONTRACTING IN CIVIL AND COMMON LAW

The engagement with the analogies drawn between the systemic changes ongoing in civil law and in common law is suggestive of an emphasis on value-

(2015) 34(1) University of Queensland Law Journal 99; John Eldridge, 'Contract Codification: Cautionary Lessons from Australia' (2019) 23(2) The Edinburgh Law Review 204.

[195] See Nottage (n 194) 133; Eldridge (n 194) 216.

[196] Mitchell (n 88) 18. See also Eldridge (n 194) 205, 223; Steiner (n 14) 35–6; 30, 39.

[197] See Dajczak (n 11) 102.

[198] ibid 100–2; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 144–8.

[199] See Dajczak (n 11) 101–2; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 147–8. For a relational perspective on contract interpretation, and the role for good faith in the interpretive exercise in diverse jurisdictions, see also Shida Galletti, 'Contract Interpretation and Relational Contract Theory: A Comparison between Common Law and Civil Law Approaches' (2014) 47(2) The Comparative and International Law Journal of Southern Africa 248; Zoe Gounari, 'Developing a Relational Law of Contracts: Striking a Balance between Abstraction and Contextualism (2021) 41(2) Legal Studies 177; Viven-Wilksch (n 4) 124; Feinman (n 82) 30–1; Gray (n 20) 166–8, 173–202.

[200] Dajczak (n 11) 101; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 147–8.

[201] See Dajczak (n 164) 95.

-driven functions of the law of contract. Inasmuch as these parallel processes have foregrounded the jurisprudential constituent of contract law, there emerges a complex framing from which to develop a generalised perspective on good faith contracting in commercial contexts.

Consequentially, a jurisprudential outlook furthers a critical approach to balancing the autonomy-oriented normative values, on the one hand, and the objectives and standards implemented institutionally through contract, on the other.[202] In civilian jurisdictions, the growing weight of general clauses – such as good faith – gives grounds to anticipate a renewal of what had distinguished the Roman law jurisprudential discourse in view of judicial interpretive competences and proficiency at a sovereign case-by-case analysis and valuation according to equity and fairness.[203] Moreover, the greater advertence to the complementarities between transactional certainty and substantive fairness in contracts can be conducive to articulating a coherent rationale to inform the operation of statutory contract law. Notably, an argumentatively-structured programme of norm-setting in contract law was adopted under the Polish Code of Obligations of 1933 which is no longer in force.[204] While of the highest legislative qualities and jurisprudential authority, the underlying axiology of this enactment remains under-researched, especially in contract law scholarship. It substantiated the idea of a modern law of obligations, conceived as a function of twofold, intersecting and at the same time mutually limiting legislative thoughts: first – to provide an appropriate protection to the interests of the parties to legal transactions, and second – to pursue the common good of the society as a whole.[205] The corollary to the respective premises was a congruous recognition of the principle of security of transactions and protection of reliance along with the principle of transactional fairness and a societally sensitive policy for a number of contractual relations.[206] Of crucial importance to the latter were the requirements of good faith. Arguably, with its

[202] For more on perceiving contract law in terms of balance between autonomy and institutionalism, see Catterwell (n 1) 1069–76, 1092. See also Bagchi (n 6).

[203] See Krzysztof Amielańczyk, 'W poszukiwaniu antycznej genezy klauzul generalnych, czyli o wartościach i wartościowaniu w prawie rzymskim' (2016) 63(2) Annales Universitatis Mariae Curie-Skłodowska: Sectio G 27, 38–9.

[204] *Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań* (Decree of the President of the Republic of Poland of 27 October 1933 – Code of Obligations) (Journal of Laws No 82 item 598, as amended) (n 24).

[205] See generally Roman Longchamps de Bérier, 'Zasady kodeksu zobowiązań' (1934) 14 Ruch Prawniczy, Ekonomiczny i Socjologiczny 77.

[206] ibid. See also Bogna Kaczorowska, 'Regulating Contracts: The Evolving Normative Contexts in Light of the Rationales Informing the 1933 Polish Code of Obligations' (2024) 139 Przegląd Prawa i Administracji (forthcoming).

commitment to avoiding excessive formalism[207] and averting extremely individualistic attitudes in contracting,[208] this approach anticipated and concretised what is now of major concern within the context of debate on policing commercial contracts. The pertinence of the question of balancing values inherent in contract law is manifest under common law, as it presently stands. Actually, instead of into an antinomy, the recent changes in the common law of contract are contended to translate into a balance struck between party autonomy and societally oriented, non-autonomy normative standards, whereas there are shifts between these values.[209] Yet, it is claimed that the latest dynamics of contract law represents a move towards increased autonomy of commercial parties.[210] Conversely, the gradually growing attention to the duty of good faith, in combination with the acknowledgement of duties to co-operate, serves an institutional objective, and is viewed as a shift in favour of maintaining institutional standards.[211] In the definition of primary obligations, however, these instantiations of the policy-directed axiology tend to be outweighed by the broader enhancement of freedom of contract.[212] Still, while not without criticism, the emerging paradigm drawing on the relational theory substantiates arguments for restoring the common law of contract's intrinsic function of communicating values and standards of contracting, such as those imported by good faith.[213] It is through this perspective that further insights can be developed into the prospects for the recognition in common law of a duty to negotiate in good faith. Enrooted in the civil law tradition, such a duty is generally rejected under common law.[214] Following the increased focus across Commonwealth jurisdictions on good faith in contract performance, the question of its potential extension to negotiations is a matter of debate in England and Wales[215] and in Canada,[216] but also in Australia.[217] Although reservations and objections persist, the addressing of such advancements reveals a number of respects in which the practice of contracting might be affected by the pursued

[207] Uzasadnienie projektu kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu w opracowaniu głównego referenta projektu prof. Romana Longchamps de Bérier: Art. 1–167 [Explanatory Memorandum, Code of Obligations (Poland)] (1934) 4 Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: Podkomisja Prawa o Zobowiązaniach 155.

[208] ibid 63; Longchamps de Bérier (n 205) 88.

[209] Catterwell (n 1) 1067, 1069, 1073.

[210] ibid 1068.

[211] ibid 1077, 1081–4.

[212] ibid 1084.

[213] Mitchell (n 88) 176, 191–2.

[214] DiMatteo (n 1) 46–7, 283–4.

[215] Giliker (n 9) 176–8, 190–8.

[216] ibid 190, 198–9; Yalden (n 88) 166–212. See also DiMatteo (n 1) 47, 285–6, 288–90.

[217] Jack O'Connor, 'The Enforceability of Agreements to Negotiate in Good Faith' (2010) 29(2) University of Tasmania Law Review 177; Swain (n 57) 95.

commercial morality. These relate, first, to the potential enforceability of express terms to negotiate some element of an existing commercial contract in good faith, taking into account the context of the contract and the nature of the parties' relationship.[218] As well, though less plausible, the acceptance of pre-contractual agreements to negotiate the main contract in good faith is contemplated.[219] Relevance is also attached to commercial practicalities involving specific good faith obligations in early-stage agreements whereby – rather than being placed within a pre-contractual, ie non-binding setting – the negotiation process is structured through contracts and receives a contractual dimension.[220]

In addition, the jurisprudentially sensible approach unfolds a critical point at the intersection of commercial contract law and the practice of contracting – specifically, the ever expanding area of private ordering detached from the state-endorsed legal framework.[221] The emerging private rule-making systems cover a manifold range of forms of alternative, bottom-up normative settings,[222] and arguably accommodate diverse interests of commercial contracting parties. While there are instances of autonomy-oriented, formalised contractual self-regulation shaped in pursuit of predictability and certainty,[223] a number of *de facto* developed contract rules and dispute resolution systems adheres to relational norms.[224] Within governance through contract design and express contract terms, a combination of both vague standards and precise rules tends to be used in formulating contractual rules, wherein the main determinants of the parties' strategy are realities of the transactional environment and business incentives.[225] Further, among the modalities of private ordering, particular attention is drawn

[218] Giliker (n 9) 193–4.

[219] ibid 194–7.

[220] Yalden (n 88) 169.

[221] See generally Brownsword, van Gestel and Micklitz (n 2) 1, 13–5; Andrew Hutchison and Franziska Myburgh, 'International Commercial Contracts: Autonomy and Regulation in a Dynamic System of Merchant Law' in Andrew Hutchison and Franziska Myburgh (eds), *Research Handbook on International Commercial Contracts* (Edward Elgar Publishing 2020) 1–2; Matthew Jennejohn, 'Do Networks Govern Contracts?' (2022) 47(2) Journal of Corporation Law 333, 335; Mitchell (n 88) 12–3, 87–114; DiMatteo (n 1) 353–4; Bogna Kaczorowska, 'The Regulatory Relevance and Legitimacy of Contract Law in Juxtaposition to Private Ordering' (2024) 3 Supreme Court Law Review, 3rd Series 79.

[222] See Mitchell (n 7) 26; Mitchell (n 88) 12, 91–94, 202; Jennejohn (n 221) 335–45; Mimi Zou, 'When AI Meets Smart Contracts: The Regulation of Hyper-Autonomous Contracting Systems?' in Martin Ebers, Cristina Poncibò and Mimi Zou (eds), *Contracting and Contract Law in the Age of Artificial Intelligence* (2022).

[223] Mitchell (n 88) 40, 93–94; Tomer S Stein, 'Rules vs. Standards in Private Ordering' (2022) 70(5) Buffalo Law Review 1835, 1841; Naveen Thomas, 'Rational Contract Design' (2023) 74(4) Alabama Law Review 967, 970–1032.

[224] See DiMatteo (n 1) 353.

[225] Stein (n 223) 1841; Thomas (n 223) 970.

to industry-specific governance by specialist trade associations and professional organisations.[226] These apparently prioritise the economic, organisational and market-driven imperatives, whereas the enforcement of agreements is legitimised by conventions of the rule-creating contracting and interpretive community.[227] Highly contextualised industries feature relational norms that are incorporated through industry customs to which the parties must conform.[228] More recently, there is a focus on exchange networks which circulate reputational information on contracting across markets,[229] where informal reputation-based sanctions serve as informal tools for enforcing contractual obligations.[230] Whereas such sanctions are supposed to foster trust-building processes,[231] the dependence by commercial parties on these regimes may be hindered by the governance costs associated with the risk of an unintended spread of technical information to third parties across the network connection.[232] A matter of growing concern is the use of autonomous algorithm-enabled systems of contract regulation designed to automate commercial transactions, mostly those based on distributed ledger technology and artificial intelligence tools, such as data-driven machine learning.[233] Due to their objective, technically-determined constraints, the scope of application of these algorithm-facilitated settings is reduced to a relatively narrow array of transactions.[234] One reason is the formality of non-contextual programming languages which precludes the integration of open-ended standards – such as good faith – into the algorithmic format of the encoded arrangements.[235] Similar arguments inform the rationale against the automation of contract interpretation in its entirety by the

[226] Mitchell (n 88) 88–98; DiMatteo (n 1) 304, 353–4.

[227] Mitchell (n 7) 27; Mitchell (n 88) 98.

[228] DiMatteo (n 1) 353–5.

[229] Mitchell (n 7) 24–5, 41; Mitchell (n 88) 91, 202; Jennejohn (n 221) 337.

[230] Jennejohn (n 221) 340–4.

[231] Mitchell (n 7) 24–5.

[232] Jennejohn (n 221) 337, 339, 346–8.

[233] See generally Eliza Mik, 'The Resilience of Contract Law in Light of Technological Change' in Michael Furmston (ed), *The Future of the Law of Contract* (Informa Law 2020); Eliza Mik, 'AI in Negotiating and Entering into Contracts' in Larry A DiMatteo, Cristina Poncibò and Michel Cannarsa (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022); Mitchell (n 88) 23–4; Zou (n 222) 41; DiMatteo (n 1) 347–8, 356; Spencer Williams, 'Edge Contracts' (2023) 25(3) University of Pennsylvania Journal of Business Law 839; Krzysztof Riedl, 'Wykładnia umów zredagowanych z wykorzystaniem generatywnej sztucznej inteligencji (AI)' (2024) 33(2) Kwartalnik Prawa Prywatnego 197.

[234] See Mitchell (n 7) 40.

[235] ibid. See also Michel Cannarsa, 'Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?' (2018) 26(6) European Review of Private Law 773, 779–80.

most advanced artificial intelligence models, while restricting their role to merely assisting in the judicial exercise.[236]

V. CONCLUSION

Contextualising the scrutiny of good faith obligations within the evolving interrelations between civil and common law affords a comprehensive perspective on the intricacies of policing commercial contracts across jurisdictions. The comparative arguments informing the latterly increased critical focus on good faith in common law derive much from civilian concepts, while further embracing Commonwealth and American laws. This imparts to the common law of contract equitable elements in commercial contexts where, notionally, the emphasis falls on legal and transactional certainty and predictability.[237] Notably, the systemic developments that underscore value-driven functions of contract law enhance a jurisprudential approach to contract regulation and to the contracting process. The apparent twofold parallel departure from the codification paradigm in continental civil law systems and from the classical Anglo-American contract law furthers a more flexible, axiology-laden reasoning in contracts. Inasmuch as the practicalities of transactions are growingly problematised by the dynamics of different forms of governance, a jurisprudentially oriented account not only contributes to concretising the perception of good faith duties, but also, more generally, advances commercial morality in terms of complementarity and balance between autonomy normative values and other institutionally pursued objectives and standards.

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[237] See Halberda (n 8) 235–6.

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LEGAL MEANING AS A SHARED ENTERPRISE: THE JUDICIARY-SCHOLARSHIP DYNAMIC THROUGH THE LENS OF THE SOCIAL DIVISION OF LINGUISTIC LABOUR

Abstract

Scholarly discussions on legal interpretation often centre on methodological approaches rather than the diverse actors who contribute to shaping legal meaning. This article refocuses attention from interpretive techniques to the agents involved in meaning-making, arguing that legal interpretation is a collaborative effort among multiple contributors. Building on Hilary Putnam's theory of the social division of linguistic labour, the paper offers a conceptual framework for understanding the distributed nature of legal interpretation. At the heart of this discussion is the interaction between legal academia and the judiciary, demonstrating how academic discourse often informs judicial decision-making, thereby reinforcing a collective enterprise in the making of legal meaning. While this study offers only an initial and illustrative account, it opens several promising avenues for future research. These include empirical inquiries into how academic arguments influence judicial reasoning, the interpretive role of legal practitioners in specialized and innovative domains, and the broader inclusion of corporate and non-institutional actors in the legal-linguistic community. Ultimately, the article argues that legal meaning should be understood not as the product of a single institutional voice, but as the outcome of a dynamic and socially distributed epistemic process.

KEYWORDS

legal interpretation, social division of linguistic labour; legal meaning, legal scholarship; judicial decision making, case law, faithful agent theory, collective meaning-making

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interpretacja prawna, społeczny podział pracy językowej, znaczenie prawne, nauka prawa, podejmowanie decyzji sądowych, orzecznictwo, teoria wiernego agenta, zbiorowe tworzenie znaczeń

I. INTRODUCTION

The interpretation of legal provisions is a central task performed by lawyers. While numerous comprehensive theories and practical guidelines exist on how legal interpretation should be performed, in this paper I focus on issues ranging from the interpretive process itself to those who engage in it. Specifically, I aim to highlight the plurality of actors involved in the construction of legal meaning. To this end, I draw on the concept of the 'social division of linguistic labour', which according to me offers a useful conceptual framework for understanding how legal interpretations function in practice. In my view, recognizing the role of the social division of labour within the legal-linguistic community is essential for grasping how legal meaning is collaboratively produced. I proceed with the assumption that case-law reflects the operative legal meanings within a jurisdiction. It follows that when conflicting interpretations occur – they may originate in such sources as legislative history or scholarly opinion – the court's understanding is decisive.

In this contribution, I aim to demonstrate the operation of the social division of linguistic labour within the legal domain by focusing on the influence of legal scholarship on the ascription of legal meanings to legal terms. I argue that privileging the role of the legislator results in an incomplete account of legal discourse, one that neglects the complex structure of interpretive voices. The motivation behind this inquiry lies in the observation that the legal interpretation literature often overlooks the cooperative dimension of interpretation. While the collectivity of processes in law has received scholarly attention, such analyses have primarily concentrated on how the multiplicity of actors involved in the formal legislative process affects the understanding of what the legislative body as a whole has

produced in that process.[1] Thus, their orientation remains primarily towards the bilateral relationship between the interpreter and the legislator, as opposed to embracing a collective perspective that incorporates all involved actors, which is a distinctive aspect of my approach.

The paper begins by showing how the salient role of the legislator is traditionally grounded, with particular attention to the faithful agent theory. I argue that neither this theory nor other notable attributes of the legislator, such as the power to craft legal definitions, necessarily compel deference to the legislator when interpreting legal terms. Next, I introduce Putnam's concept of the social division of linguistic labour and consider its manifestations within the legal domain. The influence of legal scholarship on judicial interpretation serves as an illustrative example of collaborative efforts to shape legal meaning. In adjudicating disputes, judges strive to ascertain the correct meaning of legal terms, often relying on scholarly analyses to inform their interpretations.[2] This interdependence suggests the existence of a legal form of the social division of linguistic labour. I conclude by summarising the main argument and suggesting areas for further exploration. Before proceeding, it should be noted that the discussion is confined to statutory

[1] See e.g., Richard Ekins, *The Nature of Legislative Intent* (OUP 2012); Zygmunt Tobor, *W poszukiwaniu intencji prawodawcy* (Wolters Kluwer Polska 2013); Marcin Matczak, 'Three Kinds of Intention in Lawmaking''(2017) 36 Law and Philosophy 651; Damiano Canale and Francesca Poggi, 'Pragmatic Aspects of Legislative Intent' (2019) 64(1) American Journal of Jurisprudence 125.

[2] Of course, here lies the widely recognised assumption that 'self- evidently, meaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover'. Richard H Fallon, 'The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation' (2015) 82 University of Chicago Law Review 1235, 1237. For the sake of simplicity, I will mostly refer to the meanings of legal terms. However, in a concrete interpretive context, what is at issue may not be a single word, but rather a group of words, an entire sentence, or multiple sentences. Legal practice reflects the full spectrum of these possibilities, with interpretive doubts concerning isolated words being rare. See Riccardo Guastini, 'An Exercise in Legal Realism' (2020) 25 Iuris Dictio 37, 40-41. I also wish to underscore the interpretive impact of how normative material is selected. See Victoria Nourse, 'Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language' (2017) 69 Florida Law Review 1409. In addition, I do not claim in this article that 'ascribing legal meanings' is the only or even the primary activity of legal interpreters. The interpretive process clearly involves various operations, such as the inferential derivation of norms from other norms, and the 'construction of unexpressed rules'. See Riccardo Guastini, 'Rule-Scepticism Restated' in Leslie Green and Brian Leiter (eds), Oxford Studies in Philosophy of Law: Volume 1 (Oxford, OUP 2011) 138; Riccardo Guastini, 'Juristenrecht: Inventing Rights, Obligations, and Powers' in Jordi Ferrer Beltrán and others (eds), *Neutrality and Theory of Law* (Springer 2013) 147, 153-157. However, due to the limitations of this article, I focus on the task of specifying meanings based on legal texts. Incidentally, it is noteworthy that classifying a particular interpretive decision as either a clarification of meaning or the construction of a norm may itself be controversial. Such an assessment largely depends, inter alia, on the concept of literal meaning held by the evaluator – whether minimalist or more expansive. I am grateful to the Anonymous Reviewers for pointing out the need to clarify these issues.

and constitutional interpretation. The core reasoning may hold for common law interpretation, although a detailed treatment of this area is reserved for future work due to space limitations.

II. LAW'S MEANING-MAKERS: A TRADITIONAL FRAMEWORK

Traditionally, when lawyers look for the meaning of legal terms, they firstly refer to the legislator. The validity of this approach is supported by two primary reasons. Legal practice is an activity centred on the interpretation of written sources.[3] For the functioning of the law in practice, the main point of reference are legal texts that bear the seal of approval of the legislator. They are either created or at least accepted as binding by the legislative authority. In addition, this privileged position is underlined by its exclusive authority to formulate legal definitions, which allows it to authoritatively refine or redirect the interpretation of legal terms.[4] Consequently, if the legislator disapproves of the interpretation of certain terms, it has a potent corrective tool at its disposal. The prominent position of the legislator is evident in the widespread acceptance of the faithful agent mode in the theory of legal interpretation.

This idea assumes that legal interpreters play a subordinate role to the legislator, consistent with the principal – agent model. Its roots lie in the command theory of law, according to which it was originally the monarch who exercised its sovereign power. Over time, sovereignty passed to the king-in-parliament, then to the parliament, and eventually to the people through their elected representatives. Despite this evolution, the central idea remains: interpreters are expected to follow and implement the directives of the lawmaking authority, reflecting the longstanding view that the legitimacy of the law lies in obedience to the sovereign's will.[5] It follows that any mode of operation that is not strongly deferential to the legislature, such as the use of 'more aggressive' substantive canons, creates a major problem of legitimacy.[6]

[3] For the sake of simplicity, I will further refer to institutional legal practice. Referring to non-institutional legal practice, e.g. applications of legal rules that will never find their way to courts or administrative bodies, would require more realist-oriented reflections, which I do not attempt to undertake here.

[4] See Yaniv Roznai, 'A Bird is Known by its Feathers: On the Importance and Complexities of Definitions in Legislation' (2014) 2 Theory and Practice of Legislation 145.

[5] Thomas W Merrill, 'Faithful Agent, Integrative, and Welfarist Interpretation' (2010) 14 Lewis and Clark Law Review 1565, 1567.

[6] Amy C Barrett, 'Substantive Canons and Faithful Agency' (2010) 90 Boston University Law Review 109.

The faithful agent theory is claimed to be a conventional one and so 'entrenched in our constitutional structure and practice that adopting a particular interpretation of a statute because it accords best with congressional will requires no special justification'.[7] This is also perceived as the most common assumption about the position of judges vis-à-vis lawmakers.[8] Interpreters who adhere to this theory are praised for contributing to stable and predictable legal systems.[9]

It should, therefore, come as no surprise that the emphasis on the central role of the legislature is reflected in the widely accepted theories of legal interpretation. All major theories of legal interpretation – intentionalism, purposivism, and textualism – all endorse the conception of the interpreter as a faithful agent of the legislator.[10] To remain faithful to their principal, legal interpreters are tasked with uncovering the meaning of the legislative command as accurately as possible. However, these theories differ in how they conceptualize and pursue this adequacy: intentionalists focus on identifying the legislator's intended meaning; textualists emphasize adherence to the law's textual expression; and purposivists prioritize advancing the legislative purpose attributed to the lawmaker.[11] Crucially, this variety illustrates that the prioritisation of 'speaker meaning' over 'word meaning',[12] as a means of upholding the authority of law,[13] represents merely one possible approach to maintaining fidelity to the lawmaker. In recent years, legal theorists have increasingly shifted their focus toward methods for discerning 'ordinary meaning',[14] which aligns more closely with 'word meaning' than with 'speaker meaning'.[15] The growing prominence of originalism in the U.S. constitutional interpretation most clearly reflects this trend.[16]

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[7] John David Ohlendorf, 'Against Coherence in Statutory Interpretation' (2014) 90 Notre Dame Law Review 735, 747.

[8] Kent Greenawalt, *Statutory and Common Law Interpretation* (OUP 2013), 21.

[9] Thomas W Merrill (n 5) 1577.

[10] Kevin Tobia, Brian G Slocum and Victoria Nourse, 'Progressive Textualism' (2022) 110 Georgetown Law Journal 1437, 1449.

[11] Andrei Marmor, *The Language of Law* (OUP 2014) 107-117.

[12] This distinction was introduced to philosophy of language by Paul Grice. See HP Grice, 'Utterer's Meaning, Sentence Meaning, and Word-Meaning' (1968) 4 Foundations of Language 225.

[13] Brian H Bix, 'Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?' (2003) 16 Ratio Juris 281, 287-288.

[14] Brian G Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (University of Chicago Press 2015), 4.

[15] On the inadequacy of the speaker meaning given the specificity of communication in law see Marcin Matczak, 'Does Legal Interpretation Need Paul Grice? Reflections on Lepore and Stone's Imagination and Convention' (2016) 10(1) Polish Journal of Philosophy 67; Francesca Poggi, 'Against the Conversational Model of Legal Interpretation: On the Difference Between Legislative Intent and Speaker's Intention' (2020) 40 Revus 9.

[16] Lawrence B Solum, 'We Are All Originalists Now' in Robert W Bennett and Lawrence B Solum (eds), Constitutional Originalism: A Debate (Cornell University Press 2011); Mark A

This development, I believe, reflects a more accurate account of the relationship between lawmakers and other participants in the legal domain. The traditional bias towards the lawmaker's role in the semantics of legal language distorts the actual mechanisms of legal meaning-making. It neglects, on the one hand, the structural limitations faced by lawmakers and, on the other, the interpretive significance of judicial and non-official legal practice.

Regarding the constraints placed on lawmakers in shaping the meanings of legal terms, it is important to recall that legal language is a register of natural language.[17] While it exhibits distinct semantic, syntactic, and pragmatic features, it ultimately draws upon the common language of the community to which it applies. Taking into account the functions of law, there is no alternative. Given the law's primary function of guiding human behaviour,[18] there is no viable alternative: legal subjects must be able to understand the rules they are expected to follow. Excessive idiosyncrasy in legal language undermines this objective. It is not surprising, therefore, that clarity – or intelligibility – is widely recognised as a core requirement for law to produce its intended normative effects.[19]

Moreover, the prominent position of the lawmaker does not render it omnipotent. If we look at the figure of the legislator and the law-making processes as they really are, it becomes evident that the institutions involved consist of individuals who are constrained by limited time, knowledge, and foresight regarding the situations to which their rules will apply.[20] It is inevitable, therefore, that they will make use of the expertise available in the community, both during the legislative process and later, when they rely on other participants in the legal discourse, the courts in particular, to determine the precise meanings of legal terms.[21] Since we are all familiar with the importance of the activity of the courts in modern legal

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Hannah and Francis J Mootz III, 'The Ethos of Originalism' in Brian N Larson and Elizabeth C Britt (eds), *Rhetorical Traditions & Contemporary Law* (Cambridge University Press, forthcoming 2025) 17, 17-18.

[17] Tomasz Gizbert-Studnicki, *Język prawny z perspektywy socjolingwistycznej* (Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z nauk politycznych, z 26, Państwowe Wydawnictwo Naukowe 1986), 93-102.

[18] It is taken to form part of the 'universal functions of legal systems'. See Leslie Green, 'The Concept of Law Revisited' (1996) 94 Michigan Law Review 1687, 1711.

[19] Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1969), 63-65. This does not imply that all legal subjects are supposed to understand all legal provisions. Given the level of specialisation of contemporary legal systems, it is obvious that a group of addresses of certain provisions is limited. A more detailed analysis of this issue is beyond the scope of this paper.

[20] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994), 128-129.

[21] In some instances the lawmakers deliberately formulate provisions that are highly abstract, because members of the legislative body cannot agree what rules should exactly entail in particular cases. If it happens, it is for the courts to make these legislative expressions more precise and operative in details. In this context, Cass Sunstein is known for exploring the concept of incompletely theorised agreements in law. See e.g. on the application to constitution-making: Cass R Sunstein,

systems, I will not dwell on this aspect. Instead, I would like to draw attention to a less scrutinised form of assertion about law, that of non-officials – especially academics. Before doing so, however, I would like to introduce the concept of the social division of linguistic labour, which will provide a framework for further analysis.

III. JUDICIAL-SCHOLARLY INTERACTION AS A FORM OF LINGUISTIC DIVISION OF LABOUR

The concept traces its origins to the 1970s when Hillary Putnam proposed it for the general use of language. In particular, Putnam wanted to draw attention to the fact that:

> There are tools like a hammer or a screwdriver which can be used by one person; and there are tools like a steamship which require the cooperative activity of a number of persons to use. Words have been thought of too much on the model of the first sort of tool.[22]

The basic idea is that linguistic communities naturally evolve systems in which the meaning of certain terms is maintained by experts, while others participate in language use through a kind of social trust and cooperation. Expert activity allows the broader public to access linguistic and conceptual competence within specialised fields. At the same time, a beneficiary in one field may be an expert in another, thus contributing to the community as a whole. Naturally, this linguistic division of labour is founded on and reflects the existence of a corresponding division of non-linguistic labour. Consider the case of gold: it is not necessary for every buyer to distinguish gold from pyrite. What is essential is the presence of qualified experts and a dependable certification system that ensures the authenticity of the product.[23] A comparable dynamic operates within the legal domain. Specialists in labour law possess the most comprehensive understanding of labour institutions, just as experts in criminal procedure are most familiar with the workings of criminal proceedings. The knowledge held by these experts informs both legal professionals outside their field and laypersons. As in other areas of specialisation, the availability of legal experts enables others in the community to

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'Practical Reason and Incompletely Theorized Agreements' (1998) 51 Current Legal Problems 267, 273–176.

[22] Hilary Putnam, 'The Meaning of "Meaning"' in Hilary Putnam, *Philosophical Papers*, Vol 2: *Mind, Language and Reality* (CUP 1975) 215, 229.

[23] ibid 227–228.

navigate and structure their interactions in accordance with generally applicable legal norms. Analogously to the non-legal division of social labour, experts in some fields benefit from the work of their counterparts in other fields.

An example I wish to explore is the influence of academic scholarship on the work of public officials. Naturally, the forms and degrees of this influence differ across legal systems and historical periods. My aim here is not to trace the evolution of the *communis opinio doctorum* over time, but rather to focus on current manifestations of such influence. I will begin with the most immediately noticeable examples, namely judicial references to academic sources.

Germany serves as a prime example of a well-established tradition where legal scholarship directly influences judicial opinions. The legal culture there is nurtured as an 'expert culture', in which 'the academic spirit permeates the decisions of all courts'.[24] A well-known illustration was provided by Heinz Kötz, who in the course of his research found that an average citation of academic works on a decision in a given volume could easily exceed 10 items.[25] Judicial citation of academic sources is widespread in other jurisdictions such as Argentina,[26] Poland,[27] Sweden,[28] the UK,[29] and the US. To provide more concrete data concerning the last one, Petherbridge and Schwartz have shown that from 1949 to 2009 the US Supreme Court used legal scholarship in roughly one third of its judgments.[30] Moreover, the trend of using the legal scholarship has been accelerating. In some instances, the scholarly contribution is the main reference point of a question considered by a court. This happened, e.g., in the US Supreme Court's *Ortiz v United States*[31] where Justice Elena Kagan who wrote the majority opinion devoted more than half of its length to the consideration of Aditya Bamzai's

[24] Robert Alexy and Ralph Dreier, 'Statutory Interpretation in the Federal Republic of Germany' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1st edn, Ashgate 1991, republished Routledge 2016) 105.

[25] Hein Kötz, 'Scholarship and the Courts: A Comparative Survey' in David S Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (Duncker & Humblot, 1990) 183, 193.

[26] Enrique Zuleta-Puceiro, 'Statutory Interpretation in Argentina' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1st edn, Ashgate 1991, republished Routledge 2016) 50.

[27] In particular, academic commentaries on the legislation at issue in a case are often cited.

[28] Aleksander Peczenik and Gunnar Bergholz, 'Statutory Interpretation in Sweden' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1st edn, Ashgate 1991, republished Routledge 2016) 356.

[29] Zenon Bankowski and D Neil MacCormick, 'Statutory Interpretation in the United Kingdom' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1st edn, Ashgate 1991, republished Routledge 2016) 404-405.

[30] Lee Petherbridge and David L Schwartz, 'An Empirical Assessment of the Supreme Court's Use of Legal Scholarship' (2015) 106 Northwestern University Law Review 995, 998-999.

[31] *Ortiz v United States* [2018] 585 U.S. ___ (SC).

amicus curiae. Expectedly, several other academic papers found a way to the opinion as well.[32] Moreover, this phenomenon also occurs in international courts. In this respect, it is noteworthy that it is beginning to be the subject of interest in empirical research.[33]

In some jurisdictions, the links between academia and the case-law are not that obvious. In France, legal literature is not directly cited in judicial decisions, although it may be referred to in 'conclusions'. This would be regarded as substituting an extra-legal source for the authority of the law, which is a particular point of emphasis in the standpoint on the separation of powers cultivated in France since the Revolution.[34] In Italy, Article 118 of the Supplementary Provisions annexed to the 1941 Code of Civil Procedure explicitly prohibits courts from citing legal authors in judicial opinions. Common law jurisdictions have long maintained a 'living author rule', which forbade the naming of authors in judgments, except for the deceased ones.[35] We need to also remember that citation patterns can also vary significantly between institutions in the same jurisdiction. For example, while the High Court of Australia regularly cites academic material, State Supreme Courts rarely do so.[36] Moreover, individual preferences may be decisive: not all judges are advocates of extensive citation, as it can obscure the clarity of the reasoning or even 'undermine a judgment'.[37]

Notwithstanding, the influence of legal scholarship on judicial decision-making appears undeniable. Chief Justice John G. Roberts, Jr., renowned for his frequent criticisms of academic legal writing as detached from the exigencies of judicial practice,[38] nevertheless cites scholarly authorities in approximately one-fourth of the opinions he authors.[39] Notably, this reliance becomes even more pro-

[32] Also, these contributions spanned many decades – from the 1940s to the 2020s.

[33] See Kanstantsin Dzehtsiarou and Niccolò Ridi, 'The Use of Scholarship by the European Court of Human Rights' (2024) 73 International and Comparative Law Quarterly 707 which is the first large-scale empirical study of the use of scholarship by the ECtHR.

[34] Michel Troper, Christophe Grzegorczyk and Jean-Louis Gardies, 'Statutory Interpretation in France' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Routledge 2016), 188–189. For the same reason, it is not common practice to cite judicial interpretations carried out by other courts.

[35] GVV Nicholls, 'Legal Periodicals and the Supreme Court of Canada' (1950) 28(4) Canadian Bar Review 422, 425–40.

[36] Rachel Klesch, Guzyal Hill and David Price, 'The Academy and the Courts: Citation Practices' (2023) 42(1) University of Queensland Law Journal 103.

[37] ibid 123.

[38] Diane P Wood, 'Legal Scholarship for Judges' (2015) 124 Yale Law Journal 2592, 2594. Of course, critical voices on the 'growing disjunction' between legal education and the practice of law are more common. See, e.g., Tamara R Piety, 'In Praise of Legal Scholarship' (2017) 25 William & Mary Bill of Rights Journal 801, 809-811.

[39] To be precise, in 23.08% of the opinions issued between 2005 and 2010. Lee Petherbridge and David L Schwartz (n 30).

nounced in cases of heightened controversy or complexity. As Petherbridge and Schwartz have documented, 'the Supreme Court (...) disproportionately uses legal scholarship when cases are either more important or more difficult to decide'.[40] Their research highlights that citations to academic work are more frequent in contentious decisions, such as those featuring minority votes, those overturning precedent, or those striking down legislation as unconstitutional. Furthermore, there is an increasing concentration of such references in opinions delivered in June – the final month of the Supreme Court's term, traditionally associated with the release of its most challenging decisions. These patterns suggest that, contrary to claims of irrelevance, academic scholarship plays a meaningful role in informing judicial reasoning, especially in cases that demand particularly careful consideration.[41]

Of course, the citation practices do not tell the whole story about the impact of academic works on the judiciary. The focus on this aspect may be misleading in two principal respects.[42] On the one hand, the presence of a citation may overstate the real impact of academic writing. A reference could be largely ornamental, added to lend authority to a conclusion that has already been reached independently. On the other hand, the absence of a citation does not necessarily imply a lack of scholarly influence. Firstly, we need to be aware of what is known as 'licensed plagiarism', i.e. relying on academic material without acknowledging it.[43] Occasionally, this phenomenon is beyond the control of the judges; as in Italy, for example, where a legal prohibition prevents them from granting academic credit when it is due, even if they desire to do so. Indeed, there is a plethora of scholarly contributions regarding definitions, rules, or conceptions that have been subsequently adopted by the Italian courts.[44] Furthermore, the aforementioned prohibition does not prevent courts from invoking prevailing views of legal scholarship in general, a practice which they voluntarily undertake. Nor does the rule of non-citation of living authors necessarily mean that their works have not been used in decision-making.[45] Also, judges may have absorbed ideas, arguments, or perspectives from academic sources without explicitly acknowledging them in their reasoning. The influence of intellectual ideas is often diffuse, shaping the background knowledge in ways that remain imperceptible even to the

[40] ibid 1016.

[41] ibid 1010–1015.

[42] Lord Rodger of Earlsferry, 'Judges and Academics in the United Kingdom' (2010) 29(1) University of Queensland Law Journal 29, 30–31.

[43] Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 44(1) Melbourne University Law Review 447, 452.

[44] Alexandra Braun, 'Professors and Judges in Italy: It Takes Two to Tango' (2006) 26 Oxford Journal of Legal Studies 665, 675–677.

[45] Zenon Bankowski and D Neil MacCormick (n 29) 379.

decision-maker. Consequently, a purely citation-based analysis is susceptible both to overestimation and underestimation of the true extent of academic impact on judicial decision-making.

There are two principal reasons why academic contributions may be valuable for judicial decision-making.[46] Firstly, judges operate in a time-constrained environment, which limits their capacity to conduct exhaustive research. Scholarly analyses that directly address the legal questions at issue can, therefore, provide essential support, offering judges nuanced perspectives and structured arguments that assist in resolving complex cases. It would be unrealistic to expect judges, within the confines of their substantial caseloads and procedural obligations, to conduct such examinations independently. Secondly, while judges possess extensive legal expertise, they are frequently required to adjudicate matters across a wide range of substantive areas, some of which may fall outside their primary fields of familiarity. In contrast, academic scholars develop highly specialised knowledge and employ methodological tools, including empirical research, comparative analysis and interdisciplinary approaches that may be beyond the practical reach of the judiciary. Hence, the depth and rigour of scholarly work represents a valuable resource for judges seeking to ensure that their rulings are well grounded. Of course, for this proposition to be actualised, judges must both be aware of the relevant scholarship and have the opportunity to engage with it in the midst of their busy schedules. Only then can we speak of a 'co-symbiotic existence'[47] between legal scholarship and the judiciary in which 'academics and judges create law together'.[48] The potential is the greatest in areas of law where developments are rapid and the need for support is especially strong.[49]

The observations presented here are broadly consistent with Putnam's theoretical framework. The different roles of judges and legal academics impose divergent limitations on their work. It is where these constraints are present that the strengths of the other group emerge. Judges, operating under significant time pressure and tasked with resolving concrete legal disputes, often lack the opportunity to engage in theoretical elaboration or to develop broader conceptual frameworks. Academics, freed from the exigencies of case resolution and doctrinal constraints, are better positioned to propose normative frameworks and advance *de lege ferenda* recommendations. At the same time, the authoritative role of the judiciary ensures that academic discourse remains tied to the judicial output.

There are also some complications to consider. While the analogy to Putnam's conception may serve as a point of departure, its application to law requires

[46] Susan Kiefel (n 43) 455–456.

[47] ibid 454.

[48] Alexandra Braun (n 44) 655.

[49] See e.g., Enrique Zuleta-Puceiro (n 26) 50.

adjustments. This is primarily due to the need to incorporate the normative dimension, including the institutional roles of legal actors. Putnam's account operates within a framework of decentralised linguistic practices, in which meaning emerges without recourse to any formally empowered authority. This stands in contrast to the legal field. Although any participant in legal discourse with expert knowledge can potentially provide an interpretation that gains broad acceptance, this acceptance is achieved through specific institutional channels. The decisions of authorities empowered to resolve legal disputes are central to this process. Most notably, the highest courts and tribunals exert the greatest influence on interpretive practice. Furthermore, the legislator must be accorded a special status. In instances of disagreement with prevailing interpretations in legal practice, it can issue authoritative decisions by amending legal provisions or introducing legal definitions that alter previously established meanings. Crucially, other participants in legal discourse are obliged to take such decisions into account. This is a key consideration that must not be overlooked when employing Putnam's theoretical framework. At the same time, this very argument underscores that adopting the theory of the social division of linguistic labour neither undermines the faithful agent theory nor transfers legal authority to interpreters. The legislator remains the central authority capable of shaping legal semantics through the revision or abrogation of legal provisions.

An additional point worth emphasising is that Putnam envisages a communicative dynamic between experts and laypeople, whereas judges are legal experts in their own right. In my view, however, expertise should be understood, first, as a matter of degree rather than a binary, all-or-nothing condition, and second, as a dynamic and context-sensitive attribute. On this account, legal education and judicial experience do not preclude the possibility that a particular judge may, in specific contexts, function as a 'layperson' in the sense relevant to Putnam's theory. Such a situational characterisation does not, of course, compromise the general standing of judges as preeminent legal experts. There is also an epistemic dimension to Putnam's account that warrants further exploration, related to his view on foundational semantics, which underpins content externalism.[50] Notably, a pertinent question arises regarding the kind of attitude a language user – parasitising on expert use – must adopt. Drawing from Putnam's framework with minimal modification, it might suffice for the decision-maker to know a 'stereotype'[51] and follow the referential use. However, this raises the question of the nature of legal (and, more broadly, linguistic) concepts and their application in

[50] Michael McKinsey, 'Skepticism and Content Externalism' (Winter 2024 Edition) *Stanford Encyclopedia of Philosophy* (Edward N Zalta and Uri Nodelman eds) <https://plato.stanford.edu/archives/win2024/entries/skepticism-content-externalism/> accessed 21 May 2025.

[51] Putnam (n 22) 250–251.

legal interpretation, which is a highly contentious issue. Given the limited scope of this paper, I merely highlight this problem and direct the reader towards legal scholarship in which this issue has already been explored in the context of interpretive practices in law.[52]

IV. CONCLUSION

This article has sought to highlight an often-overlooked dimension of legal interpretive practice. While the phenomenon discussed is by no means novel, it frequently escapes attention within mainstream legal theory. I have argued that Putnam's concept of the social division of linguistic labour offers a promising theoretical lens through which to understand the broader dynamics of meaning-making in law. Although this discussion focused primarily on the influence of legal scholarship on judicial reasoning, this is merely one manifestation of a wider phenomenon. For instance, the practice of citing foreign judicial decisions – commonplace among the highest national courts – offers further evidence of the collaborative nature of legal interpretation. These citations are typically used for comparative analysis rather than as binding authority under EU or international law.[53]

The recognition of a form of the social division of linguistic labour highlights the fact that legal meaning is shaped collectively. Courts frequently rely on interpretations initially developed within legal scholarship, adopting and legitimising arguments that emerge from academic discourse. In such cases, the key ideas originate outside the courts, while they act not as primary authors of meaning but as arbiters among competing views. This process does not undermine the authority of law. As has long been recognised, the respect of authority 'need not entail an approach to legal interpretation that emphasizes "the speaker meaning"'[54] understood as the legislator's meaning. The whole mechanism reinforces the view that the interpretive process is inherently collaborative and based on the broader epistemic function of expert knowledge, including linguistic

[52] Michael S Moore, 'A Natural Law Theory of Interpretation' (1985) 58 Southern California Law Review 277; David O Brink, 'Legal Theory, Legal Interpretation, and Judicial Review' (1988) 17 Philosophy and Public Affairs 105; Nicos Stavropoulos, *Objectivity in Law* (Clarendon 1996); Marcin Matczak, 'The Semantics of Openness: Why References to Foreign Judicial Decisions Do Not Infringe the Sovereignty of National Legal Systems' in Anne Lise Kjaer and Joanna Lam (eds), *Language and Legal Interpretation in International Law* (OUP 2022) 64.

[53] Martin Gelter and Mathias M Siems, 'Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe' (2013) 21 Supreme Court Economic Review 215, 268.

[54] Brian H Bix (n 13) 288.

expertise. It also suggests that law is best understood not as a static repository of legislator-driven meanings, but as a dynamic, socially distributed process of conceptual development.

Of course, as already mentioned, this article offers only a preliminary and illustrative analysis. A more comprehensive inquiry, integrating detailed theoretical elaboration with empirical research, is required to substantiate the argument further. Several promising avenues for future study emerge. First, there is a need to deepen the inquiry on conditions under which judicial decisions rely on academic interpretations – whether through citation patterns, influence on doctrinal shifts, or the adoption of particular terminologies. Second, the role of legal practitioners as contributors to interpretive innovation warrants greater attention. In practice, especially in rapidly evolving or highly technical legal domains, it is often practitioners – rather than academics or courts – who first engage with novel concepts, whether in drafting innominate contracts, crafting new legal clauses, or applying existing legal categories to new technologies. These actors may be at the forefront of interpretive development, shaping the legal landscape in ways that only later receive academic or judicial elaboration. In this context, the social division of linguistic labour could be extended to include not only scholars and judges, but also corporate actors, legal technicians, and even lay participants in legal discourse, especially in emerging fields where formal legal structures are still in flux.

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A COMPARATIVE STUDY OF CRIMINAL LIABILITY FOR ART FORGERY IN SELECTED EUROPEAN COUNTRIES

Abstract

In this paper, the author would like to outline relevant legal problems of the domestic legislation in Poland criminalizing art forgery. Academic authors, for many years, have been postulating an increase in the protection of works of art against offences such as forgery. This would increase the safety and fair trade in the art market. However, the legislator seems to ignore the problem. The author compared Polish law with similar legislative solutions in four European countries. There are two types of criminalizing art forgery. It can be approached as fraud and its penalization can be provided for either in the Criminal Code or copyright law. Another approach is direct penalization of art forgery, envisaged either in an Act dedicated to the protection of art or in one of the chapters of the Criminal Code. The author analyses the laws applicable in the Italian Republic, the Kingdom of the Netherlands, the French Republic, and the Federal Republic of Germany and assigns them to either group. The aim is to verify if any of the solutions could inspire the Polish legislator to introduce similar provisions in domestic law to help reduce this type of crime and improve criminal procedure in cases of art forgery.

KEYWORDS

comparative law, art forgery, cultural heritage protection

SŁOWA KLUCZOWE

prawo porównawcze, fałszerstwo dzieł sztuki, ochrona dziedzictwa kulturowego

I. INTRODUCTION

Art forgery is a serious problem present in the art market in every country regardless of its scale and experience, and the Polish art market is no exception.[1] Expansion of this market in the recent years has attracted new buyers, thanks to which the prices of Polish art are growing. It has also attracted dishonest sellers supplying the market with forgeries. What is more, there are many new types of buyers, many of them are art non-specialists. However, even the most experienced collectors must be very cautious when purchasing a piece of art. According to TPF Hoving, 'there has not been a single collector in the entire history of collecting who has not made a mistake'.[2] In this paper, the author would like to discuss the Polish legislative acts that criminalise forgery of a piece of art and compare them to similar solutions in four European countries – the Italian Republic, the Kingdom of the Netherlands, the French Republic, and the Federal Republic of Germany. The aim is to verify if there are any solutions that could inspire the Polish legislator to adapt necessary provisions in the domestic law to help reduce this type of crime and improve criminal procedure in cases of art forgery. Lack of universal protection of works of art and lack of criminalization of art forgery is a problem that Polish doctrine often indicates.[3] Lack of protection contributes to a decrease in the credibility of the market and the security and certainty of transactions – the very foundation of this trade.

In general, there are two methods of criminalizing art forgery:

1. it is treated as fraud and its penalization is provided for either in the Criminal Code or in copyright law;
2. an article defining art forgery contained either in an Act dedicated to the protection of art or in one of the chapters of the Criminal Code.[4]

[1] <https://pieniadze.rp.pl/inwestycje-alternatywne/art17454221-falsyfikat-w-kazdym-domu-polacy-traca-miliony-to-patologia> accessed 19 December 2021.

[2] Thomas Pearsall Field Hoving, 'The Game of Duplicity' [1968] The Metropolitan Museum of Art Bulletin 241.

[3] For example: Dariusz Wilk, *Fałszerstwa dzieł sztuki. Aspekty prawne i krymianlistyczne* (Wydawnictwo C.H. Beck 2015), 77.

[4] Agnieszka Szczekala, *Fałszerstwa dzieł sztuki. Zagadnienia prawnokarne* (Wolters Kluwer Polska 2012) 98.

II. RESEARCH AND RESULTS

1. THE REPUBLIC OF POLAND – COMBINING THE TWO SOLUTIONS

The Polish legislation combines both the above approaches. The Polish model is a semi-codex, which means there exists a special act, however, it is dedicated only to certain objects. In case of other works of art Criminal Code is used. Here are highlights of this issue. For wider analysis the author would like to refer the reader to author's other article.[5] The penalization of art forgery is included in the articles 109a and 109b of the Act of 23 July 2003 on the protection and care of monuments.[6] However, this act only protects objects that are monuments, i.e., fulfill the requirements enlisted in Article 3 of the Act. It states that a monument is an immovable or a movable object or part or group thereof, made by man or connected with man's activity and constituting a testimony to a past era or event, the preservation of which is in the interest of society due to its historical, artistic, scientific, or academic value. Point 3 of this Article adds that a movable monument is a movable object or part or group of objects referred to in point 1 of this Article. As a supplement to this regulation, Article 6 enlists objects under protection and guardianship regardless of their state of preservation. These criteria are highly subjective. Especially the evaluation of whether there is an interest in society due to its historical, artistic, scientific, or academic value to protect. In effect, administrative bodies often have difficulties identifying if the object is, in fact, a monument.

Article 109a penalizes forgery of a monument. It defines two acts, i.e., two methods of forgery – creation of a fake object and alteration of an existing one. The former aims to imitate an authentic monument and create an appearance that the work was originated by another person. The work is a new object bearing the traits of the monument. The second act penalized under the same Article is alteration. This occurs when the forger introduces changes to an original artwork. The object is still authentic, but the changes are not. This most often happens when the forger imparts different artistic or aesthetic elements.[7] Article 109a does not demand criminalization based on gaining a material benefit from a perpetrator. The liability is based on the use of a fake in the monuments trade. Usually, a perpetrator commits a forgery to increase the value of an object (however, the

[5] Olivia Rybak-Karkosz, 'Criminal Liability for Forgery of Print in Polish Legislation' [2022], 12 Wroclaw Review of Law, Administration & Economics, 77-90.

[6] Act of 23 July 2003 on the protection and guardianship of monuments [2022] JoL [Journal of Laws] 840 as amended (PL).

[7] Dariusz Wilk (n 3) 36.

Article does not make a criminalisation conditional on that fact). Therefore, there is a possibility, however rare, that perpetrator alters an object to decrease its value (for example to facilitate illicit trafficking).

Another Article relevant from the point of view of the topic is Article 109b of the Act on the protection and care of monuments. It addresses a common problem in the Polish art market – when a seller offering a fake is not necessarily its originator, i.e. the forger.[8] Again, two acts are penalized under this Article. The first one consists in disposing of a movable object as movable monument while being aware that the object is a counterfeit. And the second one consists in disposing of a monument as another monument while being aware that it has been altered or is a fake. A buyer who has discovered that his acquisition is a counterfeit and sells it as an original piece in order to retrieve money also commits the offence defined in this Article.[9]

Crimes described in both articles can only be committed intentionally (if the perpetrator intends its commission, i.e., wants to commit it or, foreseeing the possibility of its commission, accepts it[10]). However, as practice has shown, it is difficult to prove the perpetrator's intention, i.e., the knowledge that an object is a fake. Another problem for the prosecution is proving the existence of intent of using a product in a trade before or during the creation process, i.e., whilst committing a forgery. Both crimes are general crimes that can be committed by anyone who could face criminal liability, and both are subject to the penalty of fine, limitation of liberty, or deprivation of liberty up to 2 years.

As it was mentioned, Act on Monuments, protects only those objects that are monuments. As for the rest of the objects, for example pieces of contemporary art, forgery of works of art and their trade is penalized as fraud, defined in Article 286 paragraph 1 of the Polish Criminal Code. This applies to, for example, works of living artists etc. (i.e. creations of the fine arts that are not monuments). Under Article 286 paragraph 1, whoever, with the intention of gaining a material benefit, induces another person to disadvantageously dispose of their own or someone else's property by misleading this person or by exploiting the person's error or incapability to duly understand the undertaken action is subject to the penalty of imprisonment for between 6 months and 8 years.[11] This is a common crime,

[8] Kamil Zeidler (ed), *Leksykon prawa ochrony zabytków* (Wydawnictwo C. H. Beck 2010) 63.

[9] Marek Kulik, Komentarz do przepisów karnych ustawy z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami (Journal of Laws 03.162.1568) (LEX/el. 2010) accessed 19 August 2021.

[10] Art. 9 para 1. A prohibited act is committed intentionally if the perpetrator intends its commission, ie, wants to commit it or, foreseeing the possibility of its commission, accepts it. – Journal of Laws of the Republic of Poland 2022, item 1138, translation: Włodzimierz Wróbel (ed), Adam Wojtaszczyk, Witold Zontek.

[11] Act of 6 June 1997 – Criminal Code [2024] JoL [Journal of Laws] 17 as amended.

which means it can be committed by anyone who can be held criminally liable. The protected legal interest under this provision is property.

In case of valuable artworks, it is possible to apply Article 286 paragraph 1 in conjunction with Article 294 paragraph 1 or paragraph 2 (with regard to property of special cultural significance). This means a possibility of higher penalty (up to 10 years of imprisonment). However, there is a problem with enforcing these rules because the term 'property of special cultural significance' is quite unclear and it is always challenging for prosecutors to establish cultural significance.[12] However, the lack of definition of this term and the determination of its relationship to statutory concepts like 'monument' or constitutional ones like 'national heritage' preclude the determination of the object of legal protection. According to the judiciary, by using this term, the legislator emphasizes that 'there is a cultural good hierarchy and that only some of them have a special cultural significance, while others, despite their unquestionable significance, do not'.[13] The interpretative issue thus comes down to identifying the prerequisites that help decide if an object is, in fact, the 'property of special cultural significance'. According to some researchers, it has to be a cultural good that is more important for heritage than others. Some direction as to how to interpret this term could be the World Heritage List listed according to the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage from 16th of November 1972. It is possible, although unlikely, that an object listed by UNESCO could be forged and offered for sale. In such a situation, Article 286 in conjunction with Article 294 could apply. On the other hand, in rare occasions, a fake might be treated as a 'property of special cultural significance' if it has, for instance, historic value for the culture rather than artistic value.[14]

Apart from the qualified types of offense described above, Article 294 enlists two more in paragraph 3 and 4 for the crimes committed against property of a value higher than an amount equal to either five or ten times the threshold defining property of significant value. In these cases, the punishment is equal to either 3 to 20 years or 5 to 25 years of imprisonment. Apart from the qualified types of offense described above, Article 294 enlists two more in paragraph 3 and 4 for the crimes committed against property of a value higher than an amount equal to either five or ten times the threshold defining property of significant value. In these cases, the punishment is equal to either 3 to 20 years of imprisonment or 5 to 25 years.

[12] Jan Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, Vol 2 (Kantor Wydawniczy 'Zakamycze' 2001) 604–605.

[13] Case II AKa 90/18, LEX nr 2524972, 27 June 2018, Court of Appeal in Kraków.

[14] Dariusz Wilk (n 3) 49.

The problem with this legal regime is that it is challenging, especially in the context of transactions in the art market, to prove that, by accepting an obligation, the seller already intended not to keep it. The Supreme Court said that 'the most crucial for the criminal liability is a connection between misleading a person or exploiting this person's error and disadvantageous disposal of property'.[15] The perpetrator's actions must result in the disadvantageous disposal of someone's property by taking one of three actions described in article 286 paragrapha 1, leaving other ways of achieving this result beyond the criminalisation of this article.[16] As a result of this action, a perpetrator gains a material benefit, which could be either increasing their assets or decreasing their liabilities.[17] The perpetrator acts to gain a material benefit, and it is not relevant whether he succeeds. It is challenging, especially in the art market trade, to prove that, by accepting an obligation, a seller had already intended not to keep it. Other evidence difficulties regard proving that perpetrator acted with the direct purpose of gaining a material benefit.[18]

And as a result, such cases are rarely reported or disclosed, and those that are prosecuted are often discontinued. What is more, a mere forgery of a piece of art is not enough to convict a person under Article 286 paragraph 1.[19] Such act could be qualified as preparation to fraud, which in the discussed situation, according to Article 16 paragraph 2 of the Criminal Code, is not punishable.[20]

2. THE FRENCH REPUBLIC – COMBINING THE TWO SOLUTIONS

In France, like in Poland, works of art are protected by a combination of the two solutions. There is an Act on forgery of works of art (*Loi du 9 février 1895 sur les fraudes en matière artistique*), called 'Bardoux law', however, its application is limited to specific objects. It applies to objects covered by author's economic rights. In other words, all works of art are protected except for those in the public domain, so those whose author's died no later than 70 years ago. As far as the rest of artworks is concerned, their protection is granted under the Penal Code (*Code pénal*). A separate solution to regulate art market includes practices regarding the presentation of the nature, composition, origin and age of the goods sold and to avoid confusion between original, copy or imitation, the regulatory authority has established a pre-

[15] *E.K. v "S" S.C.* [19 July 2007] V KK 384/06 (Poland's High Court) LEX No 299205.

[16] Małgorzata Dąbrowska-Kardas, Piotr Kardas 'Article 286' in Andrzej Zoll (ed), *Kodeks Karny. Część szczególna. Tom III. Komentarz do art. 278-363* (5th edn, Wolters Kluwer 2022) 278-279.

[17] Konarska-Wrzosek (n 35) 1210.

[18] Maciej Trzciński, *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna* (Wolters Kluwer 2010) 53.

[19] Dariusz Wilk (n 3) 50.

[20] Art. 16 para 2. Preparation is punishable only when a statute provides so.

cise terminology, which must be used in transactions involving works of art and collectibles, and is intended to inform buyers about the specifications of the goods offered.[21] Thus, any facsimile, over-moulding, copy or other reproduction of a work of art or a collectible must be designated as such.[22] Defining the terms 'attributed to', 'school of', 'in the taste of', 'style, manner of, genre of, after' etc. and requiring copies, reproductions, etc. to be visibly mentioned is obligatory.[23]

'Bardoux law' penalizes forgery of a signature by placing or indicating another author's mark on works of art such as painting, sculpture, print, or musical work. It also penalizes fraudulent forging to mislead the buyer as to the authorship of the work. The punishment for these acts is imprisonment up to 2 years and a fine of €75,000. Participants in the art market who, despite knowing about the object's falseness, either place it on the market or trade it can face the same penalty. This is referred to as forgery by proxy.[24] Article 3 of the Act provides for another punitive measure – irrespective of the outcome of the court proceedings, the court might order confiscation of the counterfeit or its delivery to the prosecutor. This prevents further resale of the fake in the art market and, as a consequence, another fraud. The lack of similar obligation in Polish jurisdiction is a severe problem. As a result, the same counterfeits are repeatedly offered to different buyers. The art market is helpless and the legislator seems reluctant to solve the problem.

As it is challenging to find sufficient evidence and prove the intention (when prosecuting a monument's forgery) or the purpose of gaining a material benefit while inducing another person to disadvantageously dispose of their own or someone else's property by misleading this person or by exploiting the person's error (when prosecuting fraud), most cases are discontinued. In such situation, the fake returns to the previous owner, and it might as well return to the art market. This problem, constantly signalled in Polish academic literature,[25] by art experts[26] and journalists,[27] still remains unsolved.

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[21] Elisabeth Fortis, 'La Marchandisation de L'art et le Droit Penal' [2017] 39 Archives de politique criminelle, 35.

[22] Decree No 81-255, 3 March 1981 on the repression of fraud in art transactions and collections, known as the 'Marcus decree'.

[23] Elisabeth Fortis (n 21).

[24] Dariusz Wilk (n 3) 244.

[25] For example: Wojciech Szafrański, 'Wpływ falsyfikatów na rynek sztuki. Siła prawa czy jego bezradność?' in Robert Pasieczny (ed), *Problematyka autentyczności dzieł sztuki na polskim rynku* (Narodowy Instytut Muzealnictwa i Ochrony Zbiorów 2012) 44-61.

[26] For example: Janusz Miliszkiewicz, Rafał Belke, „Falsyfikaty krążą po rynku sztuki" (2010) Rzeczpospolita <https://www.rp.pl/ekonomia/art16055111-falsyfikaty-obrazow-kraza-po-rynku-sztuki> accessed 27 July 2022.

[27] For example: Andrzej Skórka, 'Tarnowianin handlował podrobionymi obrazami' (2011) Gazeta Krakowska <https://gazetakrakowska.pl/tarnowianin-handlowal-podrobionymi-obrazami/ar/450131> accessed 27 July 2022.

The Act has been in force since 1895 and the doctrine has pointed out that its protection is insufficient nowadays, allowing for a modern scope of art forgery. France is the fourth country in the world art market in terms of the number of transactions.[28] The 'Bardoux law' only penalizes the forgery of a signature, an author's mark and leaves out the forgery of the object (which does not necessarily need to be signed). Moreover, a signature is an addition to the piece, not its integral part. So, its authenticity (or forgery) does not determine an artwork's authenticity (or forgery). Additionally, the Act only mentions a few fine arts, such as painting, sculpture, print, or musical work, and only these are protected by the Act's rules. Given the rising popularity of digital art, this enumeration needs to be widened. The protection should also cover all the artworks, also these in the public domain.

As mentioned before, in respect to forged works of art in the public domain, the provisions of the Penal Code defining fraud and fraudulent obtaining apply. Article 313-1 defines the latter as an act of deceiving a natural or legal person by the use of a false name or a fictitious capacity, by the abuse of a genuine capacity, or by means of unlawful manoeuvres, thereby to lead such a person, to his prejudice or to the prejudice of a third party, to transfer funds, valuables or any property, to provide a service or to consent to an act incurring or discharging an obligation. Fraudulent obtaining is punished by five years of imprisonment and a fine of €375,000.[29] The following Article 313-2[30] provides for an aggravated type of the offence with a higher penalty of imprisonment up to 7 years and double fine of €750,000 if the fraudulent obtaining is committed: 1. by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission; 2. by a person unlawfully assuming the capacity of a person holding a public office or vested with a public service mission; 3. by a person making a public appeal with a view to issuing securities or raising funds for humanitarian or social assistance; 4. to the prejudice of a person whose particular vulnerability, due to age, sickness, infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator. In addition, the penalties are increased to ten years' imprisonment and to a fine of €100,000 if the fraud is committed by an organized gang. This statutory regime is concluded by Article 313-3, providing that an attempt to commit offences set out under the same Section of the Code is subject to the same penalties. Finally, in cases of fraudulent obtaining, no prosecution may be initiated where the offence is committed by a person: 1. to the prejudice of his

[28] Information report Ass. Nat. No 4234, filed by S. Travert on 16 November 2016, 23.

[29] Criminal Code of the French Republic (*Code pénal*).

[30] ibid.

or her ascendant or his or her descendant; 2. to the prejudice of a spouse, except where the spouses are separated or authorised to reside separately.[31]

Similarly to Polish solution, the French one is also critised. The protection of works of art is scattered across several acts, which does not promote understanding of the criminal policy followed in this area.[32] A seperate issue, highlighted by the doctrine is a judiciary practice. The dedicated criminal qualifications of artistic fake and counterfeiting are abandoned in favour of those of fraud or deception on the substantial qualities of the object. The criminal policy followed then has the effect of making the work of art appear more like a commodity than as a work of a creator to be protected.[33]

As a result, on the initiative of the Senate, a revision of the provisions concerning the penalisation of art forgery was proposed. The proposed amendment[34] seeks to repeal the so-called 'Bardoux Law' and to introduce a new Chapter II bis, entitled 'Combating Art Forgery', into the Heritage Protection Code (*Code du patrimoine*). These provisions would offer protection to all works of art, regardless of their date of creation or the technique used to create them. A criminal act will be any creation or modification, by any means, of work of art with the intent to deceive others about the identity of its creator, its origin, its dating, its nature, its composition, or its provenance. Similarly to 'Bardoux law' not only the forger will be punished but a person that presents, distributes or transmits, free of charge or for a fee, a work of art knowing its misleading nature. The penalties for these acts have been toughened, compared to 'Bardoux law' and aligned with those for fraud. It would be five years imprisonment and a fine of €375,000.

Heavier penalties are set for fraud committed habitually or with the help of accomplices (7 years in prison and a fine of €750,000) and for fraud committed by an organized gang (10 years in prison and a fine of €1 million).

The additional penalty for these acts is a confiscation of works and return to the complainant or if such person does not exist – their destruction. The latter is a restrictive solution, however it helps to protect the art market and its users. The work would not be brought back to the market. Such is a big problem in Polish art market. When an investigation is discontinued, the questioned works come back to the owner who often sells it through a legitimate source.

The bill was accepted by the Senate and now it is waiting for The National Assembly approval. At the moment of writing this article, the first reading of the legislation has been completed.[35]

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[31] Article 311–12. ibid.

[32] Elizabeth Fortis (n21).

[33] ibid.

[34] Proposition de loi, n° 109 par le Sénat, deposed on 23 July 2024.

[35] <https://www.senat.fr/dossier-legislatif/ppl22-177.html> accessed 20 March 2024.

3. THE FEDERAL REPUBLIC OF GERMANY – ART FORGERY AS FRAUD

The German legislative framework is an example of the former solution – art forgery is penalized as a fraud. The relevant legal basis has been provided for in paragraph 263 of the German Criminal Code[36] (*Strafgesetzbuch, BGBl.* I S. 3322). Under this Article, a penalty of imprisonment for a term not exceeding five years or a fine is decided on a person that with the intention of obtaining an unlawful pecuniary benefit for themselves or a third party, damages the assets of another by causing or maintaining an error under false pretences or distorting or suppressing true facts. Additionally, different than in Poland, an attempt is also punishable and the court may order supervision of conduct. In especially serious cases, the penalty is imprisonment for a term from six months to 10 years. An especially serious case typically occurs where the offender: 1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery of documents or fraud; 2. causes a major financial loss to or acts with the intention of placing a large number of persons in danger of financial loss by the continued commission of fraud; 3. places another person in financial hardship; 4. abuses his or her powers or position as a public official or European official; or 5. pretends that an insured event has happened after they or another person have set fire to an object of significant value or destroyed it, in whole or in part, by setting fire to it or caused the sinking or grounding of a ship.[37] And, lastly: whoever commits fraud on a commercial basis as a member of a gang whose purpose is the continued commission of such offences as: fraud, subsidy fraud, forgery of documents, forgery of technical records or forgery of data of probative value, incurs a penalty of imprisonment for a term between one year and 10 years, and, in less serious cases, imprisonment for a term between six months and five years.[38]

This legal regime is very similar to the Polish legal definition of fraud. Both legislative frameworks emphasize the perpetrator's purpose, i.e., obtaining an unlawful pecuniary benefit. However, the German Act additionally requires that the benefit be received by the perpetrator or a third party (Polish Act emphasises the need for a perpetrator to gain a benefit). Furthermore, both acts do not penalise mere creation of a fake, i.e., alteration or forgery. This would be treated as a preparation for committing a fraud, and would not be punished according to the Article 16 paragraph 2 of the Polish Criminal Code. Not until the fake has been used to gain a material benefit by misleading the buyer into believing in the false attribution and authenticity of the object this would be a crime. Another similarity

[36] Criminal Code (*Strafgesetzbuch, BGBl. I S. 3322*).

[37] ibid.

[38] ibid.

between the Polish and German legislation is the relation between the damage and misleading of a person or exploiting the person's error by the perpetrator through either providing false or altered data or withholding information.

According to the German Criminal Code, art forgery can also be prosecuted as document forgery under paragraph 267 *StGB*. This provision states that anyone who produces a forged document, falsifies a genuine one, or uses such a document to commit fraud in legal transactions is liable to a penalty of up to five years' imprisonment or a fine. Attempting to commit this offense is also punishable. The document in question must be misleading with regard to the identity of its author; however, the truth or falsity of the content itself is irrelevant.

Paragraph 3 of this section outlines the first aggravated form of the offense, punishable by imprisonment ranging from six months to five years. This applies when the offender acts in a professional capacity or as a member of a gang formed for the purpose of committing repeated acts of fraud or forgery, causes significant financial loss, seriously endangers the integrity of legal transactions through the use of numerous forged or falsified documents, or abuses their authority or position as a public or European official. The second aggravated form, described in paragraph 4, carries a penalty of one to ten years' imprisonment. It applies to individuals who commit document forgery on a commercial basis as members of a gang organized for the continuous commission of such offenses.

It is debatable whether a work of art can be considered a document because the commonly accepted definition in legal doctrine describes a document as a statement which, by virtue of its content, is intended and suitable to serve as proof of a legal relationship, and which allows the identification of its author. It is widely accepted that works of art – such as paintings, sculptures, prints, and similar – do not meet this definition. Therefore, paragraph 267 of the German Criminal Code (*StGB*) should not be applied in such cases.[39] A similar view was expressed some time ago by Polish legal scholars who argued that a painting does not constitute evidence of a legal relationship or any fact that could have legal consequences. Neither its form nor its substance allows it to be treated as a document. Its primary function is to provide an aesthetic or emotional experience.[40]

However, as demonstrated by German court rulings, it is accepted in judicial practice to classify art forgery as both fraud and document forgery, treating them as cumulative offenses. This approach is justified by the argument that a signature on a painting serves as proof of authorship. This reasoning, however, is open to criticism. A signature is a separate element added to the artwork, and

[39] Joachim Löffler, 'Künstlersignatur und Kunstfälschung - Zugleich ein Beitrag zur Funktion des par. 107 UrhG' [1993] 22 NJW, 1424.

[40] Teresa Dukiet-Nagórska, Tadeusz Widła 'Odpowiedzialność karna za sfałszowanie obrazu' [1980] 4 Nowe Prawo, 6.

it can be used independently of the painting itself – for example, as part of an exhibition logo or in the context of an art school. One of the most well-known cases in German legal history is the prosecution of Wolfgang Beltracchi, a forger, along with his accomplices: his wife Helene, her sister Jeanette Spurzem, and his brother-in-law Otto Schulte-Kellinghaus. The court classified Beltracchi's actions as document forgery, as he falsely attributed authorship by forging signatures, and cumulatively as fraud. The case was also deemed an aggravated offense, as it was proven that all four defendants operated as members of a gang organized for the ongoing commission of document forgery on a commercial scale.[41]

Changes in German criminal law could, in general, not be detected as a result of any of the cases. And the need of change has been postulated for years. Similarly to Polish doctrine, the German one also proposes the creation of a crime of 'forgery of art' and penalisation of it as a different act from fraud and forgery of documents. With regard to the policing and prosecution of art fraud, they are rare and difficult, leading to lenient sentences and frustration of investigators and prosecutors alike. *Beltracchi* case and others prove that there is no correlation between the complexity of the investigations and the sentence received by offenders. There is equally no consistency of the correlation between the damage caused by offenders and the impact on the detection, investigation and prosecution of art fraud as well as preventive strategies implemented by the art market.[42]

4. THE KINGDOM OF THE NETHERLANDS – THE FIRST SOLUTION WITH ADDITIONAL CRIMINALIZATION OF SIGNATURE FORGERY

Dutch legislation is also an example of the first type of protection – art forgery is treated as fraud and, consequently, the Dutch Criminal Code applies (*Wetboek van Strafrecht*, BWBR0001854). The Code contains a unique solution for the forgery of a signature placed on works of art, Section 326[43] applies. Under this provision, any person who, with the intention of benefitting himself or another person, unlawfully, either by assuming a false name or a false capacity, or by cunning manoeuvres, or by a tissue of lies, induces a person to hand over any property, to render a service, to make available data, to incur a debt or relinquish a claim, shall be guilty of fraud and shall be liable to a term of imprisonment

[41] Case 110 KLs 17/11, LG Cologne, Judgment of 27 October 2011.

[42] Saskia Hufnagel, 'Case Study 1: Beltracchi and the History of Art Fraud in Germany' in Saskia Hufnagel, Duncan Chappell (eds), The Palgrave Handbook on Art Crime (Palgrave Macmillan 2019), 321–342.

[43] Criminal Code (*Wetboek van Strafrecht*, BWBR0001854).

not exceeding four years or a fine of the fifth category.[44] Item 2 of this Section defines an aggravated type of the offence by providing that the punishment shall be increased by one third if the offence was committed with the intention of preparing or facilitating a terrorist offence. It is important to prove the perpetrator's knowledge that the object is a fake.[45]

This Section penalises the use of another person's signature (or other author's designation), forgery, and a trade in objects that bear such signatures or other designations. A perpetrator is either the forger himself or another party who knows that the signature is spurious even though he or she has not forged it. This legal regime shows certain similarities to Articles 109a and 109b of the Polish Act on the protection and care of monuments. However, the main difference is that the Dutch law exclusively applies to forgery of the author's designation while the Polish Monuments Act penalizes forgery of an entire object. In addition, Section 326b protects each and every work of literature, science, art or craft, whereas Articles 109a and 109b, as mentioned before, protect only monuments. Moreover, the Dutch law penalises an act regardless of whether the perpetrator acted with the intention to gain a material benefit or induced another person to disadvantageously dispose of their own or someone else's property. Such intention becomes relevant when it comes to proving a forgery of a work of art (the whole object, rather than the author's designation).

In Polish literature, for years, the need has been raised to introduce a similar solution in the domestic legislation,[46] that is to penalise forgery of a signature. Sadly, though, this has not been done so far. The legislature is reluctant and continually ignores the problem. As a result, it is necessary to search for different provisions to legally classify the offence. There are several legislative acts that come into question. These are the following acts: the Criminal Code of 6 June 1997,[47] the Code of Contraventions of 20 May 1971,[48] the Act of 16 April 1993 on combatting unfair competition,[49] the Act of 30 June 2000 – Industrial Property Law.[50] The choice of the legal basis depends on how the artist's signature is qualified – as trademark, identification mark, signature, or logo. In the author's

[44] According to Section 23, 4 of Criminal Code it is 83.000€.

[45] Sentence by the Appeal Court, ECLI:NL:GHSHE:2011:BP9521, 30-03-2011, 20-001515-08.

[46] For example: Maciej Trzciński (n 18) 72.

[47] Act of 6 June 1997 – Criminal Code [2024] JoL [Journal of Laws] 17 as amended (PL), English version: Włodzimierz Wróbel (ed), Adam Wojtaszczyk, Witold Zontek, <https://www.lex.pl/> accessed 15 August 2021.

[48] Act of 20 May 1971 – Petty Offence Code [2023] JoL [Journal of Laws] 2119 as amended (PL).

[49] Act of 16 April 1993 on Fair Trading [2022] JoL [Journal of Laws]1233 as amended (PL).

[50] Act of 30 June 2000 Industrial Property Law [2023] JoL [Journal of Laws] 1170 as amended (PL).

opinion, Article 306 of the Criminal Code seems to be the best solution. It offers universal protection but only as long as we recognise a signature as a standalone element, being an identification mark.

Under this Article, whoever removes, forges, counterfeits, or alters the manufacturer's identification marks, date of manufacture, or date to which merchandise or device is fit to use is subject to the penalty of deprivation of liberty for up to 3 years.[51] Article 306 relates to marks placed on merchandise, that is in consumer business trading. Such merchandise is genuine, however, it bears an altered manufacturer's identification label. If, at the same time, the genuine label is removed and replaced with a different one, both conditions (of removing and forging) are met. Under this legal regime, the subject of protection is truthful merchandise data i.e. information permitting the product's identification.[52] Signature on a work of art is such information (if we classify it as a trademark). The manufacturer's identification marks are, among other things, traits that help to individualize a particular piece. In case of prints, for instance, a protected element is also the number of a given copy within the edition. Signature on a work of art constitutes such information (if we classify it as a trademark). The manufacturer's identification marks are, among other things, traits that help to individualize a particular piece. In case of prints, for instance, a protected element is also the number of a given copy within the edition.

An act will be recognized as offence if the purpose of the actions referred to in the Article is to make a pretence that the merchandise comes from a different (false) source of origin.[53] This rule was introduced mainly to protect devices like cars, but obviously, it can apply to other offenses, like forgery of a signature on a work of art. Again, this is possible if a signature is treated as a means to designate its author. In that case, it is an identification mark of an artist. Offences defined in this Article are subject to the penalty of deprivation of liberty for up to 3 years. This provision does not penalize the manufacture and trade of such merchandise.[54] Such solution is far from perfect.

[51] Act of 6 June 1997 – Criminal Code [2024] JoL [Journal of Laws] 17 as amended (PL), English version: Włodzimierz Wróbel (ed.), Adam Wojtaszczyk, Witold Zontek, <https://www.lex.pl/> accessed 15 August 2021.

[52] Robert Zawłocki (ed), Przestępstwa przeciwko przedsiębiorcom. Komentarz (Wydawnictwo C. H. Beck 2003) 752.

[53] Dariusz Wilk (n 3) 55.

[54] Michał Królikowski, Robert Zawłocki (eds), *Kodeks karny. Część szczegółowa. Tom II. Komentarz. Art. 222-316* (Wydawnictwo C.H. Beck 2017) 1003.

5. THE ITALIAN REPUBLIC – A LEGISLATIVE ACT DEDICATED TO THE PROTECTION OF ART

The Italian legislation is an example of the second solution, and the main legislative act regulating the discussed offence is the Code of the Cultural and Landscape Heritage (*Codice dei beni culturali e del paesaggio* – D.lgs. 22 gennaio 2004, n.42). Article 178 (Forgery of Works of Art) lists acts that give rise to criminal liability. These are as follows:

a) counterfeiting, altering or reproducing a work of painting, sculpture or graphic art, or an antique object, or an object of historical or archaeological interest (if the action is undertaken for gainful purposes);
b) putting on sale, holding for the purpose of sale, introducing into the territory of the State with the purpose for sale or, in any case, putting into circulation samples of works of painting, sculpture, graphic art or antique objects, or objects of historical or archaeological interest designating them as authentic while they are counterfeited, altered or reproduced. This refers to perpetrators who do not participate in forging a piece of work, yet, know about its fake status;
c) authenticating objects mentioned above knowing they are fakes;
d) certificating fakes as authentic through other declarations, evaluations, publications, affixation of stamps or labels or by any other means.

These acts are punishable by imprisonment for a period from three months to four years and with a fine ranging from €103.00 to €3,099.00. However, if the offence is committed in the exercise of the perpetrator's commercial activity, the punishment will be increased (Article 178 (2)). Beside a conviction, fine and a ban under Article 30 of the Criminal Code, there is another applicable punitive measure, that is a publication of the conviction in three daily newspapers with national circulation. Article 36, paragraph 3 of the Penal Code shall apply.

This Article penalizes each type of act relating to fake objects. From creating a fake, copying a work of art, putting it on sale, or using it in trade (as mentioned before, the seller does not have to be the forger but it is sufficient that he knows that the object is not an authentic piece of art) to authenticating such objects. The definition of 'counterfeiting' is to make a thing look like some other original thing that is already known.[55] The Italian Corte Suprema di Cassazione (Supreme Court of Cassation) established the counterfeiter's intentions to 'counterfeit' a work of art in a judgment of 2 December 2004, as an attempt 'to make things look authen-

[55] Anna Gerecka-Żołyńska, 'Penalizing The Forgery of a Work of Art in the Polish Legal System: Notes *de lege lata* and Postulates *de lege ferenda*' [2022], 2 Ruch Prawniczy, Ekonomiczny i Socjologiczny, 83.

tic, simulating its origin contrary to its true origin'.[56] The Article penalizes a wide range of acts certifying a fake, whether it is a fake Certificate of Authenticity or false expertise, or another form of expert opinion and it applies to each person regardless of them being experts or not.[57] Subsection (a) of the Article highlights the perpetrator's purpose, which is to make gain. And this might be any type of gain. That is the main difference between the Italian and Polish law. The latter, as mentioned before, knows two principal statutory regimes that may relate to this delinquency type. Article 286 paragraph 1 of the Criminal Code requires that the gain be material if the act is to be criminalised. And Article 109a of Act of 23 July 2003 on the protection and care of monuments only indicates that the forged or altered monument must be used in trading. This means that a perpetrator commits an offence when selling an object or exchanging it for another one. An offence is not committed when the object is donated.

However, there are certain similarities between the Italian and Polish regimes. Subsection (b) of Article 178 is similar to Article 109b of the Monuments Act. Both penalize selling fakes when the seller knows of their falseness. Moreover, both Articles indicate that the seller need not be the producer nor the author of the fakes at the same time. The main difference between the statutory frameworks is the scope of protection. As mentioned above, the Italian Act offers broader protection as it applies to any type of work of art, whereas the Polish one protects only monuments.

Trading participants in the art market should be reliable, their actions should be based on trust and guarantee certainty of transactions. Therefore, the second paragraph of Article 178 provides for an aggravated type of the offence – punishment is considerably higher if an offence was committed in the exercise of the perpetrator's commercial activity. An additional punitive measure may be imposed, under Article 30 of the Italian Penal Code, namely a ban on such commercial activity from one month to five years unless in situations clearly defined by law. This punitive measure is similar to the one laid down in Article 41 paragraph 2 of the Polish Criminal Code. The court may prohibit the exercise of a specific business activity while convicting for an offence committed in relation to the pursuance of such business activity if its further exercise poses a threat to substantive, legally protected interests.[58] The subjects of protection of this Article are works of art such as paintings, sculptures, or graphic arts, or an antique object or an object of historical or archaeological interest. However, the Italian judiciary

[56] R. Moramarco, 'Commento all'art. 178 Contraffazione di opere d'arte' in G. Famiglietti, N. Pignatelli (eds), Codice dei beni culturali e del paesaggio (Neldiritto Publisher 2015), 1133.

[57] Dariusz Wilk (n 3) 267.

[58] Code of the Cultural and Landscape Heritage – Legislative Decree No 42 of 22 January 2004.

stresses that, in fact, only copies with unique traits attributable to the work considered to be reproduced should be protected by this provision.[59]

Item 3 of the Article is similar to Article 43b of the Polish Criminal Code. Accordingly, the court may order publication of the sentence in a particular manner if this is found expedient, especially bearing in mind the social impact of the sentence, unless such publication infringes on the injured party's interests.[60] Additionally, the court will always order forfeiture of items directly derived from an offence, unless they belong to persons other than the parties to the offence. This is similar to Article 44 paragraph 1 of the Polish Criminal Code.

Article 179 of the Code of the Cultural and Landscape Heritage stresses the most significant difference between the Italian and Polish legislation. It lays down situations when Article 178 does not apply. Under that Article, the discussed provisions do not apply to: whosoever reproduces, holds, puts on sale, or otherwise distributes copies of works of painting, sculpture or graphic art, or copies or imitations of antique objects or objects of historical or archaeological interest which are expressly declared to be inauthentic when exhibited or sold, by means of written annotation on the work or on the object or, when this is not possible because of the nature or size of the copy or imitation, by means of a declaration issued upon exhibition or sale. Nor do the provisions apply to artistic restorations which do not reconstruct the original work in a determinant manner. Also under Polish law, such cases are not considered offences, however, this conclusion comes from academic literature and is based on the interpretation of the Monuments Act. Nonetheless, in order to succeed on a criminal charge under this law, irrefutable proof of intent to deceive and financial gain is necessary.[61] Even though, the Italian code is a fine solution, it still can be improved. It lacks a clear implementation pattern when it comes to arguing that someone (apart from the forgers themselves) is aware of the non-authenticity of the artifact.[62]

III. CONCLUSION

The analysis of legal aspects of art forgery allows to draw the following conclusions. There are two types of legislative frameworks penalising forgery

[59] Agata Klimczyk, 'Analiza prawnoporównawcza przepisów dotyczących zjawiska fałszerstwa dzieł sztuki w prawie polskim i włoskim' [2016] Journal of Education, Health and Sport 241.

[60] Code of the Cultural and Landscape Heritage - Legislative Decree No 42 of 22 January 2004.

[61] Tatyana Kalaydjian Serraino, 'Remembering Modigliani: Italy's Ongoing Battle against Forgery', <https://itsartlaw.org/2020/07/17/remembering-modigliani-italys-ongoing-battle-against-forgery/> accessed 12 December 2021.

[62] ibid.

of an artwork. The first one approaches it as fraud, an offence defined in the Criminal Code. This solution was chosen by the Federal Republic of Germany and the Kingdom of the Netherlands. The Netherlands are also the only of the analysed jurisdictions to penalize forgery of an artist's signature as a separate type of offence. The author believes that the adoption of a similar solution in Polish law would be very helpful from the point of view of law enforcement, as prosecutors often lose an uneven battle with deceitful sellers offering forgeries in our domestic art market.

The second mechanism of protection is direct penalisation of art forgery. Such offence is defined either in a dedicated Act or in a chapter of the Criminal Code devoted to works of art.[63] The Italian Code of the Cultural and Landscape Heritage is a fine example of such an approach. Certain States have decided to combine both models. In the French Republic, the Act on forgery of works of art applies to objects outside the public domain. As far as the rest is concerned, protection is afforded under the Penal Code (*Code pénal*). A similar solution can be found in Polish domestic law, in Articles 109a and 109b of the Act on the protection and care of monuments. However, it is far from perfect because the Act protects only works of art declared as monuments. As a consequence, other works lack such protection. In addition, Article 109a requires that prosecutors prove the perpetrator's intent to deceive and market a counterfeit, which is a necessary condition of liability. This means that the act is only penalized when committed intentionally. Most cases are discontinued because it is challenging to find sufficient evidence and prove the intention.

Academic authors for many years have postulated (and still do) an increase in the protection of works of art against offences such as forgery. This would improve the security and fair trade in the art market. The author proposes to define all offences against any works of art in a separate chapter of the Polish Criminal Code or in a separate Act dedicated to works of art as a total. This would guarantee universal protection for all works of art, and not only for monuments (The Monuments Act would be *lex specialis* to such Act, due to the special significance and care of objects qualified as monuments). In addition, the author proposes to adopt the same solution as applicable in the French Republic when dealing with fake – the court should be in a position to order confiscation of a counterfeit or its delivery to the prosecutor regardless of the outcome of the court proceedings.

A good legislation providing protection and assurance for the participants of the art market is crucial not only for the stabilisation and trustworthiness of the market itself. It is also important for the level of credibility of the artistic heritage, or more broadly speaking, the national cultural heritage. It would also contribute

[63] Agnieszka Szczekala (n 4) 98.

to strengthening the social belief that the behaviours penalised in it are dangerous and should not be underestimated.[64]

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[64] Anna Gerecka-Żołyńska (n 55) 83.

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PROHIBITION OF ADVERTISING BY VETERINARY SURGEONS IN LIGHT OF EU LEGAL REGULATIONS

Abstract

This article analyses the compliance of Polish regulations prohibiting veterinary surgeons from advertising with European Union law, particularly Directive 2006/123/EC on services in the internal market and Directive 2000/31/EC on electronic commerce. In the Polish legal system, advertising of veterinary services is prohibited under the Veterinary Clinics Act and resolutions of the National Veterinary Council. This prohibition raises concerns in light of EU provisions, which require the abolition of total bans on advertising for regulated professions.

The article highlights that veterinary surgeons, as representatives of a regulated profession under EU directives, should be allowed to use commercial communications. It also attempts to define the concept of 'commercial communication' within Polish and EU law. The author posits that current Polish regulations violate Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC, which mandate the removal of advertising bans for regulated professions. The analysis provides arguments supporting this hypothesis, underscoring the need for the reform of national legislation.

KEYWORDS

veterinary advertising, commercial communication, regulated profession, professional ethics

SŁOWA KLUCZOWE

reklama weterynaryjna, informacja handlowa, zawód regulowany, etyka zawodowa

I. INTRODUCTION

The issue of advertising by veterinary surgeons within the Polish legal framework lies at the intersection of professional ethics and positive law. This topic appears to be quite controversial within the professional community of veterinary surgeons. Under the current national regulations, advertising by veterinary surgeons is prohibited. This prohibition is understandable, as the regulation of veterinary surgeons' advertising is intended to reconcile the protection of consumer rights with the necessity of ensuring dignity and public trust in the veterinary profession. The ban on advertising veterinary services, as enshrined in the Polish legal order, exemplifies a regulation aimed at limiting the commercialisation of veterinary practice, thereby safeguarding both animal welfare and the public interest.

The Professional Ethics Committee of the District Veterinary Chamber (DIL-Wet) has dealt with cases involving unauthorised forms of advertising by veterinary clinics, with discussions and admonitions in most instances leading to the cessation of irregularities.[1] Additionally, the veterinary community highlights the challenges in distinguishing between information and advertising. Questions arise, such as: Is an SMS reminder about a vaccination considered advertising? Does publishing a video of a performed procedure on social media result in disciplinary liability? Can a veterinary surgeon appear in advertisements unrelated to their profession? What are the boundaries of permissible content on social media and websites? Could disseminating information about scientific activities be regarded as advertising?[2]

Given these considerations, there is a growing need for regulatory reform that would allow advertising within specific boundaries, enabling client information while maintaining adherence to the principles of professional ethics.

Consequently, a question arises: How can the ethical requirements and principles associated with the practice of a profession of public trust be balanced with

[1] Wojciech Hildebrand, 'Materiały na XXI Okręgowy Zjazd Sprawozdawczy Lekarzy Weterynarii Dolnośląskiej Izby Lekarsko-Weterynaryjnej Sprawozdanie Prezesa z działalności Rady DIL-WET VII kadencji za rok 2018' (2019) 29 Biuletyn DIL-Wet 7.

[2] Anna Zalesińska, 'Interpretacje zapisów Kodeksu Etyki Lekarza Weterynarii (tezy)' (2019) 29 Biuletyn DIL-Wet 58.

national regulations on advertising? On the other hand, it should be noted that the issues related to advertising are also subject to EU law, particularly Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market[3] (hereinafter referred to as Directive 2006/123/EC), and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (E-Commerce Directive)[4] (hereinafter referred to as Directive 2000/31/EC).

In light of the above, the primary research problem is the compliance of national law with EU regulations. The aim of the study is to determine whether Polish regulations governing advertising in the veterinary profession align with EU legal standards. It should be emphasised that this issue, in the context of EU law, has not yet been subject to detailed analysis in relation to the advertising of veterinary surgeons. Moreover, the existing literature on advertising in professions of public trust has primarily focused on the legal or dental professions,[5]

[3] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36 <https://eur-lex.europa.eu/eli/dir/2006/123/oj> accessed 5 December 2024.

[4] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0031> accessed 5 December 2024.

[5] Joanna Nowak-Kubiak, *Ustawa o działalności leczniczej. Komentarz do art. 14* (Legalis 2012); Filip Grzegorczyk, 'Komentarz do art. 14' in Magdalena Dulińska, Tomasz Głąb, Maciej Potoczny, Tomasz Rytlewski, Urszula Walasek-Walczak, and Filip Grzegorczyk (eds), *Ustawa o działalności leczniczej. Komentarz* (Lex 2013) <https://sip.lex.pl/#/commentary/587537960/335400/grzegorczyk-filip-red-ustawa-o-dzialalnosci-leczniczej-komentarz?pit=2023-04-06&cm=URELATIONS> accessed 20 November 2024; Tomasz Rek, 'Komentarz do art. 14' in Maciej Dercz and Tomasz Rek, *Ustawa o działalności leczniczej. Komentarz* (3rd edn, Lex 2019) accessed 20 November 2024; Małgorzata Paszkowska, 'Prawne ograniczenia reklamy świadczeniodawców rynku usług medycznych' ABC <https://sip.lex.pl/#/publication/469861290 accessed 20 November 2024; Małgorzata Barańska, 'Kontrowersje wokół wizerunku lekarza w reklamie - podejście normatywne' (2019) 4 Marketing i Rynek 42, 43; Sabina Ostrowska, 'Kształtowanie wizerunku podmiotu działalności leczniczej' (2014) 185 Studia Ekonomiczne 142, 150; Irena Ozimek, Julita Szlachciuk, and Agnieszka Bobola, 'Reklama wybranych dóbr i usług w świetle regulacji prawnych i kodeksu etyki reklamy' (2017) 330 Studia Ekonomiczne 162, 172; Piotr Piesiewicz, 'Zmiany w zakresie regulacji podawania do publicznej wiadomości informacji o zakresie i rodzajach udzielanych świadczeń zdrowotnych' in Teresa Gardocka, Tomasz Maksymiuk, and Jarosław Skrzypczak (eds), *Zdrowie: problem medyczny, prawny, polityczny* (Lex 2012) 297, 305; Eleonora Zielińska, 'Ogłaszanie i reklamowanie się lekarzy' (2000) 6–7 Prawo i Medycyna 105, 123; Czesław Kłak, 'Reklama w ustawie o działalności leczniczej' (2017) 3 Prawo i Medycyna 8, 22; Czesław Kłak, 'Informacja o zakresie i rodzajach udzielanych świadczeń zdrowotnych a reklama w świetle ustawy o działalności leczniczej' in Beata Namysłowska-Gabrysiak, Katarzyna Syroka-Marczewska, and Anna Walczak-Żochowska (eds), *Prawo wobec problemów społecznych. Księga Jubileuszowa Profesor Eleonory Zielińskiej* (Lex 2016).sip.lex.pl/#/commentary/587319041/586293/dercz-maciej-rek-

with only a small portion addressing this issue in the context of EU law.[6]

It has been hypothesised that the veterinary profession, as a regulated profession within the meaning of Directives 2006/123/EC and 2000/31/EC, should have the ability to use commercial communications. This, however, conflicts with the current national regulations prohibiting advertising. These prohibitions, arising from Article 29(1) and (2) of the Act of 18 December 2003 on Veterinary Clinics[7] (hereinafter: the Veterinary Clinics Act) and §3 of Resolution No 116/2008/IV of the National Veterinary Council of 12 December 2008 on detailed rules for publicising information on the scope and types of veterinary services, opening hours, and the address of veterinary clinics[8] (hereinafter: Resolution 116/2008/

tomasz-ustawa-o-dzialalnosci-leczniczej-komentarz-wyd-iii?pit=2023-04-06&cm=URELATIONS accessed 20 November 2024; Małgorzata Paszkowska, 'Prawne ograniczenia reklamy świadczeniodawców rynku usług medycznych' ABC <https://sip.lex.pl/#/publication/469861290 accessed 20 November 2024; Małgorzata Barańska, 'Kontrowersje wokół wizerunku lekarza w reklamie - podejście normatywne' (2019) 4 Marketing i Rynek 42, 43; Sabina Ostrowska, 'Kształtowanie wizerunku podmiotu działalności leczniczej' (2014) 185 Studia Ekonomiczne 142, 150; Irena Ozimek, Julita Szlachciuk, and Agnieszka Bobola, 'Reklama wybranych dóbr i usług w świetle regulacji prawnych i kodeksu etyki reklamy' (2017) 330 Studia Ekonomiczne 162, 172; Piotr Piesiewicz, 'Zmiany w zakresie regulacji podawania do publicznej wiadomości informacji o zakresie i rodzajach udzielanych świadczeń zdrowotnych' in Teresa Gardocka, Tomasz Maksymiuk, and Jarosław Skrzypczak (eds), *Zdrowie: problem medyczny, prawny, polityczny* (Lex 2012) 297, 305; Eleonora Zielińska, 'Ogłaszanie i reklamowanie się lekarzy' (2000) 6–7 Prawo i Medycyna 105, 123; Czesław Kłak, 'Reklama w ustawie o działalności leczniczej' (2017) 3 Prawo i Medycyna 8, 22; Czesław Kłak, 'Informacja o zakresie i rodzajach udzielanych świadczeń zdrowotnych a reklama w świetle ustawy o działalności leczniczej' in Beata Namysłowska-Gabrysiak, Katarzyna Syroka-Marczewska, and Anna Walczak-Żochowska (eds), *Prawo wobec problemów społecznych. Księga Jubileuszowa Profesor Eleonory Zielińskiej* (Lex 2016).

[6] Magdalena El-Hagin, 'Dyrektywa 2005/29/WE o nieuczciwych praktykach handlowych w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej – część I' (2021) 1(223) Studia Prawnicze 123–169; Piotr F. Piesiewicz, 'Problematyka zakazu reklamowania się podmiotów leczniczych oraz lekarzy w świetle Kodeksu Etyki Lekarskiej, prawa krajowego oraz prawa unijnego' (2019) 3 Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze, Wydawnictwa i Inne 122–144; Piotr F. Piesiewicz, *Prawne i etyczne aspekty reklamy adwokackiej* (Warszawa 2021); Piotr F. Piesiewicz and Wojciech Płowiec, 'Reklama lekarzy po zmianach Kodeksu etyki lekarskiej z 2024 roku z perspektywy prawa Unii Europejskiej' (2024) 86(3) Ruch Prawniczy, Ekonomiczny i Socjologiczny 35–55 <https://doi.org/10.14746/rpeis.2024.86.3.03> accessed 20 November 2024.

[7] Polish Journal of Laws 2019, item 24.

[8] Resolution No 116/2008/IV of the National Veterinary Council of 12 December 2008 on detailed rules for public disclosure of information on the scope and types of veterinary services provided, opening hours, and the address of veterinary establishments <https://vetpol.org.pl/wp-content/images/uchwaly/uchwaly_IV_kadencja/Uchwa%C5%82a_Nr_116_w_spr._szczeg%C3%B3lnych_zasad_podawania_do_publicznej_wiadomo%C5%9Bci_inf.o_zakresie_i_rodzajach%C5%9Bwiadczonych_us%C5%82ug_weter._godz._otwarcia_i_adresie_ZLZ.pdf> accessed 5 December 2024.

IV), are inconsistent with Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC. These provisions unduly restrict the ability of veterinary surgeons to use commercial communications.

In light of the proposed research hypothesis, it was necessary to address several questions. First and foremost, it was essential to determine who is responsible for the publication of promotional materials under national law. It was also necessary to define the material scope of application of Directive 2000/31/EC and Directive 2006/123/EC, and to assess whether Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC apply to the veterinary profession – ie, whether this profession can be considered regulated within the meaning of these provisions. A key aspect also involved understanding the concept of 'commercial communication', as defined in Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC. This text is the first of two articles that the author intends to dedicate to the issue of advertising in the veterinary profession. The present article focuses on analysing the compliance of national law with EU law, while the second will address the consequences of such non-compliance for the disciplinary bodies of the veterinary professional self-government.

II. ENTITIES RESPONSIBLE FOR ADVERTISING UNDER NATIONAL LAW

Pursuant to Article 4 of the Veterinary Clinics Act, a veterinary surgeon is required to practise their profession with particular diligence, in accordance with the principles of veterinary ethics and deontology. Furthermore, Article 45 of the same Act stipulates that members of the veterinary self-governing body are subject to professional liability before veterinary disciplinary courts for actions that violate the principles of veterinary ethics and deontology or the regulations governing the practice of the veterinary profession.

According to Article 5(1) of the Veterinary Clinics Act, 'a veterinary clinic may be established and operated by natural persons, legal entities, or organisational units without legal personality'. The legal status of the director of a veterinary clinic is addressed in Article 5(2), which provides that 'the director of a veterinary clinic, hereinafter referred to as the "director", may only be a veterinary surgeon who is authorised to practise in the territory of the Republic of Poland'. These provisions distinguish the role of managing a veterinary clinic from that of operating it.

Managing a veterinary clinic is a role exclusively reserved for veterinary surgeons licensed to practise in Poland (Article 5(2) of the Veterinary Clinics Act).

The director is responsible for the substantive management of the facility and overseeing the provision of veterinary services. According to a view expressed in the case law of the Supreme Court:

> The director of a veterinary clinic – a veterinary surgeon – must be familiar with the relevant regulations, including sector-specific rules such as resolutions of the National or Regional Veterinary Chamber, not only those pertaining to substantive activities but also those related to organisational aspects, including the premises in which the entity operates.[9]

Consequently, under the Veterinary Clinics Act, the director of a veterinary clinic, as a veterinary surgeon, is obliged to adhere to the principles of the Veterinary Surgeon's Code of Ethics. Performing this role does not exempt them from these obligations; rather, it imposes additional duties, particularly in ensuring compliance with ethical principles.

According to Resolution No 116/2008/IV, which defines the form and content of information on the scope and type of veterinary services provided (§1), 'the director of a veterinary clinic is responsible for implementing the provisions of this resolution' (§7). Furthermore, pursuant to §6 of Resolution No 116/2008/IV, 'a veterinary surgeon practising in a veterinary clinic is responsible for the content of press, radio, and television publications involving their participation'. It should be emphasised that merely identifying the entity responsible for public dissemination of what is referred to in §1 of Resolution No 116/2008/IV as 'public information' is not inconsistent with Directive 2006/123/EC or Directive 2000/31/EC, as these legal acts do not address this issue. The EU legislator leaves the determination of the responsible entity within the discretion of national lawmakers.

The formal possibility of bringing charges under §7 of Resolution No 116/2008/IV does not imply that, under applicable EU law, there is a substantive legal basis to attribute guilt to an accused veterinary surgeon for committing a disciplinary offence involving the use of veterinary advertising, particularly in cases where national regulations are inconsistent with EU law.

III. MATERIAL SCOPE OF DIRECTIVE 2000/31/EC AND DIRECTIVE 2006/123/EC

Directive 2000/31/EC, commonly referred to as the E-Commerce Directive, focuses on the legal aspects of information society services, particularly electronic commerce within the internal market. Its objective is to eliminate legal

[9] Judgment of the Polish Supreme Court of 19 June 2015, case No SDI 15/15, LEX No 1745839.

barriers hindering the efficient functioning of the internal market in the field of information society services (recitals 1 and 32). It addresses regulations related to electronic commerce, online services, and the liability of internet service providers. This includes issues such as the use of commercial communications (advertising) online by regulated professions (recital 21).

According to Article 1, the Directive does not apply to certain areas, such as taxation, data protection, matters relating to contracts or practices governed by competition law, client representation and defence before courts, the activities of notaries, or gambling. However, activities related to the veterinary profession are not excluded from the scope of the Directive insofar as they pertain to the practice of a regulated profession.

Directive 2006/123/EC, by contrast, has a broader scope, encompassing all types of services, whereas Directive 2000/31/EC is limited to information society services. The objective of Directive 2006/123/EC is to create a single market for services (recital 1), while the aim of Directive 2000/31/EC is to regulate the legal aspects of electronic commerce.

Directive 2006/123/EC applies to a wide range of services across various evolving types of activities, including advertising (recitals 21 and 100). Article 2(2) of the Directive specifies activities to which it does not apply, and veterinary activities are not included in this list. While Article 2(2)(f) excludes 'healthcare services, whether or not they are provided within healthcare facilities, and regardless of how they are organised and financed at national level or whether they are public or private', recital 22 clarifies that this exclusion applies solely to medical and pharmaceutical services provided by healthcare professionals with the aim of assessing, maintaining, or restoring a patient's health. The concept of a 'patient' refers exclusively to human beings, as defined in Article 3(h) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, which states that 'patient' means any natural person who seeks to receive or receives healthcare in a Member State. Consequently, it can be concluded that Directive 2006/123/EC does not exclude the veterinary profession from its scope, particularly given that Regulation 2016/429 (Animal Health Law)[10] and other EU legal acts do not use the term 'patient' in the context of animal health protection. In summary, both directives – Directive 2006/123/EC and Directive 2000/31/EC – can be applied to the veterinary profession. However, this analysis will focus exclusively on the potential application of these directives in the context of veterinary surgeons' use of commercial communications.

[10] Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law') <https://eur-lex.europa.eu/eli/reg/2016/429/oj> accessed 5 December 2024.

IV. THE VETERINARY PROFESSION AS A REGULATED PROFESSION UNDER EU LAW

Pursuant to Article 8 of Directive 2000/31/EC, 'Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted, subject to compliance with the rules of the profession, in particular those relating to the independence, dignity and honour of the profession, professional secrecy, and fairness towards clients and other members of the profession'. Similarly, Article 24(1) of Directive 2006/123/EC provides that 'Member States shall remove all total prohibitions on commercial communications by the regulated professions'.

Directive 2006/123/EC defines a regulated profession as a professional activity or set of professional activities as defined in Article 3(1)(a) of Directive 2005/36/EC. According to Article 3(1)(a) of Directive 2005/36/EC, a regulated profession is 'a professional activity or a set of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions, to the possession of specific professional qualifications; in particular, the use of a professional title restricted by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit of such an activity'. A regulated profession is, therefore, one whose exercise is conditional upon meeting qualification requirements and conditions specified in separate regulations.

Directive 2000/31/EC also defines a regulated profession as any profession within the meaning of Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration,[11] or within the meaning of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training, supplementing Directive 89/48/EEC. It is important to note that these acts were repealed by Directive 2005/36/EC.

In relation to the veterinary profession, as with other sectoral professions, EU regulations have been fully incorporated into Directive 2005/36/EC.[12]

[11] Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration [1989] OJ L19/16 <https://eur-lex.europa.eu/eli/dir/1989/48/oj> accessed 5 December 2024.

[12] Teresa Malinowska, 'Zawód lekarza weterynarii – zawód wolny, regulowany czy zaufania publicznego?' (2019) 94(11) Życie Weterynaryjne 732–739.

At the national level, the veterinary profession is regulated, among other legal acts, by the Act of 21 December 1990 on the Veterinary Profession and Veterinary Chambers. Moreover, this profession is included in the EU Regulated Professions Database as recognised under Directive 2005/36/EC.[13] Consequently, it can be unequivocally stated that the provisions of Directive 2006/123/EC, as well as those of Directive 2000/31/EC concerning regulated professions, apply to the practice of veterinary surgeons.[14]

In summary, the veterinary profession qualifies as a regulated profession under Directives 2006/123/EC and 2000/31/EC. Therefore, Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC are applicable to this profession. The profession is also recognised under Directive 2005/36/EC, while at the national level, it is governed by legal acts such as the Act of 21 December 1990 on the Veterinary Profession and Veterinary Chambers.

V. THE CONCEPT OF 'COMMERCIAL COMMUNICATION'

Directives 2006/123/EC and 2000/31/EC define the term 'commercial communication' in similar ways. According to Article 4(12) of Directive 2006/123/EC, a 'commercial communication' means:

> Any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession'. Similarly, under Article 2(f) of Directive 2000/31/EC, a 'commercial communication' is defined as: 'Any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.

The difference in wording between the Polish translations of the definitions in Directives 2006/123/EC and 2000/31/EC arises from the use of the phrases '*mającą na celu promowanie*' (having the purpose of promoting) in Directive 2006/123/EC and '*przeznaczoną do promowania*' (intended to promote) in Article 2(f) of Directive 2000/31/EC. This variation is a result of translation, not an

[13] Regulated Professions Database <https://ec.europa.eu/growth/tools-databases/regprof/home> accessed 5 December 2024.

[14] Joanna Helios and Wioletta Jedlecka, 'Lekarz weterynarii jako zawód zaufania publicznego' (2022) 97(10) Życie Weterynaryjne 645–648; Andrzej Krasnowolski, 'Zawody zaufania publicznego, zawody regulowane oraz wolne zawody. Geneza, funkcjonowanie i aktualne problemy' (Thematic study OT-625, Chancellery of the Senate, November 2013) <https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/56/plik/ot-625_.pdf> accessed 20 November 2024.

intended divergence in the substance of the definitions. The English and French versions of both directives use identical phrases: 'communication designed to promote' (English) and '*communication destinée à promouvoir*' (French).[15] Additionally, the translation of 'commercial communication' as '*informacja handlowa*' in Polish may create interpretative challenges for veterinary surgeons. The term '*informacja handlowa*' could be misconstrued as referring to a neutral message focused on conveying factual information. However, in EU law, the terms 'commercial communication' (English) and '*communication commerciale*' (French), as well as the concepts of 'promotion' or 'marketing communication' in marketing theory, pertain to activities primarily aimed at promotion – that is, influencing the decisions of the recipient.[16] This interpretation aligns with the definitions of commercial communication cited above, which explicitly indicate that the purpose of such communication is to promote goods, services, or the image of the entity, whether directly or indirectly. The misinterpretation of '*informacja handlowa*' as a neutral or factual concept might lead veterinary surgeons to underestimate the legal implications of their communications. It is critical to understand that, under EU law, any communication aiming to influence recipient decisions – whether in advertising or broader promotional activities – falls within the scope of 'commercial communication'.

The European Commission confirms the broad scope of the concept of 'commercial communication' in its documents, noting that it includes activities such as advertising, direct marketing, sponsorship, sales promotion, and public relations. The terms 'commercial communication' and 'marketing communication' are equivalent, with advertising being one of the forms of commercial communication under Directives 2006/123/EC and 2000/31/EC.[17] In Polish legal literature, it has also been proposed that the term 'commercial communication' should encompass both direct and indirect promotion, including direct and indirect advertising, public and private advertising, direct marketing, sales promotion, sponsorship, public

[15] Piotr F Piesiewicz, *Prawne i etyczne aspekty reklamy adwokackiej* (Warszawa 2021) 251–252.

[16] Piotr F Piesiewicz, *Prawne i etyczne aspekty reklamy adwokackiej* (Warszawa 2021) 251–252; 'L'encyclopédie illustrée du marketing' <https://www.definitions-marketing.com/ definition/communication-commerciale/> accessed 20 November 2024.

[17] Green Paper on On-line Gambling in the Internal Market SEC(2011) 321 final, p 3, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM%3A2011%3A0128%3AFIN%3Aen%3APDF> accessed 14 November 2024; Commercial Communications in the Internal Market. Green Paper from the Commission, COM (96) 192 final, April 8, 1996, <https://europa.eu/documents/comm/green_papers/pdf/com96_192_1_en.pdf> accessed 14 November 2024; Press Release details, <https://europa.eu/rapid/press-release_IP-96-396_en.html>, indicating that the term Commercial Communications includes 'advertising, direct marketing, sponsorship, sales promotion and public relations'.

relations, and offers to conclude a contract. This approach is fully justified.[18] This view is supported by the case law of the Court of Justice of the European Union (CJEU). In its judgment of 5 April 2011 (C-119/09), regarding the interpretation of Article 24(1) of Directive 2006/123/EC, the Court explicitly stated that the concept of commercial communication, as defined in Article 4(12) of Directive 2006/123/EC on services in the internal market, covers not only classic advertising but also other forms of advertising and information aimed at attracting new clients, including other types of commercial communication such as advertising, direct marketing, or sponsorship.[19] In another judgment concerning the interpretation of Article 8 of Directive 2000/31/EC, the CJEU clarified that the definition of commercial communication in Article 2(f) of the Directive specifies that this concept covers any form of communication designed to promote, directly or indirectly, the services of a person exercising a regulated profession.[20]

Considering the above, it should be concluded that the concept of 'commercial communication', as defined in Directives 2006/123/EC and 2000/31/EC, encompasses all forms of promotion or marketing communication as understood in marketing theory. This concept includes, both in the context of marketing theory and as per the definition in the directives, indirect (impersonal) promotion, such as advertising, public relations, and sales promotion, as well as direct (personal) promotion, such as personal selling and solicitation.

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[18] Dominik Lubasz, '3.2. Informacja handlowa' in *Handel elektroniczny. Bariery prawne* (Warszawa 2013) <https://sip.lex.pl/#/monograph/369285092/65?tocHit=1 accessed 14 November 2024; Dominik Lubasz and Witold Chomiczewski, 'Komentarz do ustawy o świadczeniu usług drogą elektroniczną' in *Świadczenie usług drogą elektroniczną oraz dostęp warunkowy. Komentarz do ustaw*, Monika Namysłowska (ed) (Warszawa 2011) art 2 <https://sip.lex.pl/#/commentary/587537008/334448?tocHit=1 accessed 14 November 2024; Xawery Konarski, *Komentarz do ustawy o świadczeniu usług drogą elektroniczną* (Warszawa 2004) 54–55; Marek Świerczyński, 'Komentarz do art. 2' in *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz*, Jacek Gołaczyński (ed) (Oficyna 2009) <https://sip.lex.pl/#/commentary/587247059 accessed 5 December 2024; Paweł Litwiński, '5.10. Zasady posługiwania się informacją handlową' in *Prawo Internetu*, Paweł Podrecki (ed) (Warszawa 2007) <https://sip.lex.pl/#/monograph/369312509/85?tocHit=1&cm=SREST accessed 5 December 2024; Aneta Frań-Adamek, 'Komentarz do art. 2' in *Świadczenie usług drogą elektroniczną. Komentarz* (LEX/el. 2002) <https://sip.lex.pl/#/commentary/587275374/72814?tocHit=1 accessed 5 December 2024; Piotr F. Piesiewicz, *Prawne i etyczne aspekty reklamy adwokackiej* (Warszawa 2021) 253–255.

[19] Case C-119/09 Société Fiduciaire Nationale d'Expertise Comptable v Ministre du Budget, des Comptes Publics et de la Fonction Publique [2011] ECR I-2551, ECLI:EU:C:2011:208 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0119&qid=1733402155821> accessed 5 December 2024.

[20] Case C-339/15 Criminal proceedings against Luc Vanderborght [2017] ECLI:EU:C:2017:335 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62015CJ0339> accessed 5 December 2024.

VI. ABOLITION OF ALL TOTAL PROHIBITIONS ON THE USE OF COMMERCIAL COMMUNICATIONS BY VETERINARY SURGEONS

Article 8 of Directive 2000/31/EC imposes an obligation on Member States to ensure that representatives of regulated professions, including veterinary surgeons, are permitted to use commercial communications. Similarly, Article 24(1) of Directive 2006/123/EC requires Member States to abolish all total prohibitions on commercial communications provided by representatives of such professions. The essence of both provisions is similar: they aim to enable representatives of regulated professions to use commercial communications, meaning the direct or indirect promotion of goods, services, or their professional image. However, the terms 'use' in Article 8 and 'abolish all total prohibitions' in Article 24 highlight different aspects of this obligation. The term 'use' in Article 8 refers to the right of regulated professionals to actively engage in using commercial communications to promote their services. In contrast, the phrase 'abolish all total prohibitions' in Article 24 emphasises the need to remove barriers that would restrict access to such communications, thereby ensuring the right to freely utilise them. In practice, both provisions pursue the same objective: to guarantee representatives of regulated professions the ability to use commercial communications as part of providing information to society . To achieve this, Member States must abolish all national regulations that impose total bans on the use of commercial communications by these professional groups, including veterinary surgeons. They must also introduce provisions explicitly allowing the use of commercial communications.

In light of Articles 8 and 24 of the analysed directives, it can be argued that national regulations on veterinary surgeons' advertising fail to meet the standards established by EU law, as they impose a prohibition on the use of commercial communications by veterinary surgeons. EU law clearly states that such prohibitions must be abolished, and national regulations should enable representatives of regulated professions, including veterinary surgeons, to use commercial communications in a manner consistent with professional ethics as well as the principles of proportionality and transparency.

To align national legislation with EU law requirements, the legislature should undertake the following legislative actions: 1) repeal the total ban on veterinary surgeons' advertising contained in the current national regulations; 2) establish detailed legal frameworks that allow veterinary surgeons to use commercial communications, with potential restrictions tailored to the specific nature of the veterinary profession. The adoption of such regulations must comply with the procedure outlined in Chapter 6a of the Act of 22 December 2015 on the Rules for

the Recognition of Professional Qualifications Acquired in the Member States of the European Union.[21]

VII. SUMMARY

In summary, the objective of this study was to examine the compliance of Polish regulations prohibiting veterinary surgeons from advertising with EU law, particularly Directives 2006/123/EC and 2000/31/EC. To achieve this objective, an analysis was conducted of national regulations, including the Veterinary Clinics Act and resolutions of the National Veterinary Council, in relation to EU provisions and the case law of the Court of Justice of the European Union. Key to this analysis was understanding the concepts of 'regulated profession' and 'commercial communication', which play a significant role in the context of the study. The article hypothesised that veterinary surgeons, as members of a regulated profession under EU directives, should have the ability to use commercial communications, which is at odds with the current Polish laws prohibiting advertising.

The analysis confirmed this hypothesis, demonstrating that Polish regulations restricting veterinary surgeons from advertising violate Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC, both of which require the abolition of total prohibitions on commercial communications in regulated professions. It was concluded that existing national regulations require reform to allow veterinary surgeons to use commercial communications in a manner consistent with the principles of professional ethics and deontology. A clear answer was provided to the research question, highlighting the inconsistency of Polish regulations with EU law and the need to align them with European standards. National solutions should consider both the needs of regulated professions and the ethical standards required in these fields. The conclusions presented not only underscore the necessity of legislative changes but also offer practical guidance for further research into the regulation of professions of public trust in the context of EU norms on commercial communications.

[21] Act of 22 December 2015 on the principles of recognition of professional qualifications acquired in the Member States of the European Union (consolidated text: Journal of Laws [2023] item 334).

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